TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 12

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MORGAN'S, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 29, 1934
CERTIORARI GRANTED APRIL 30, 1934

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in United States Circuit Court of Appeals, First Circuit	1	1
Caption [omitted in printing]	1	1
Proceedings before United States Board of Tax Appeals	1	1
Docket entries, no. 46639	1	1
Docket entries, no. 46640	3	2
Amended petition, no. 46639	5	3
Notice of deficiency	7	4
Answer to amended petition, no. 46639	10	6
Amended petition, no. 46640	10	7
Notice of deficiency	12	8
Answer to amended petition, no. 46640	13	9
Memorandum opinion, Smith, M	14	9
Order correcting memorandum opinion	16	11
Decision, no. 46639	17	12
Decision, no. 46640	17	12
Petition for review and assignments of error, no. 46639	18	12
Petition for review and assignments of error, no. 46640	23	16
Stipulations for consolidation	28	19
Praecipe for record, no. 46639	30	21
Praecipe for record, no. 46640	31	21
Clerk's certificate [omitted in printing]	32	22
Memorandum as to orders of consolidation, etc	32	22
Order consolidating cases	33	22
Minute entries	33	23
Opinion, Wilson, J	35	23
Final decree	43	29
Recital as to issuance of mandate	43	29
Clerk's certificate [omitted in printing]	44	29
Order extending time within which to apply for writ of certiorari	48	29
Order allowing certiorari	49	30

1 Before United States Board of Tax Appeals

Docket No. 46639

MORGAN'S, INCORPORATED (PARENT), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For petitioner: J. M. Pullman, Esq. (withdrawn), Lawrence E. Green, Esq.
For respondent: C. C. Holmes, Esq.

Docket entries

1929
Dec. 17—Petition received and filed. Taxpayer notified. (Fee paid.)
Dec. 18—Copy of petition served on general counsel.
1930
Jan. 23—Answer filed by general counsel.
Jan. 25—Copy served on taxpayer—General calendar.
Jan. 24—Amended petition filed by taxpayer.
2 Jan. 27—Copy of amended petition served on general counsel.
Jan. 29—Answer filed by general counsel. Copy served 1/30/30.
1932
Jan. 27—Hearing set March 2, 1932.
Feb. 4—Motion to place on the Boston, Mass., circuit calendar filed by taxpayer. 2/5/32 granted.
June 17—Notice of hearing at Boston, Mass., beginning July 25, 1932.
July 25—Hearing had before Charles P. Smith, division 5, on merits. Submitted. Consolidated with 46640. Stipulation of facts filed. Briefs due in 45 days.
Aug. 6—Transcript of hearing July 25, 1932 filed.
Sept. 3—Brief filed by taxpayer.
Nov. 5—Memorandum opinion rendered—Charles P. Smith, division 5. Judgment will be entered for respondent.
Nov. 7—Decision entered—Division 5, Charles P. Smith.
Nov. 30—Praecipe for appearance of Lawrence E. Green as counsel for petitioner filed.
1933
Jan. 3—Motion to revise memorandum opinion filed by taxpayer.
Jan. 4—Order revising memorandum opinion entered.
Jan. 13—Notice of withdrawal of J. M. Pullman and request to send all notices to L. E. Green filed by Mr. Pullman.
Jan. 14—Petition for review to U.S. Circuit Court of Appeals (1) with assignments of error filed by taxpayer.
Jan. 17—Proof of service filed.
Feb. 27—Stipulation to consolidate with docket 46640 for single transcript of record filed.
Mar. 3—Praecipe with proof of service thereon filed by taxpayer.
Mar. 6—Copy or order from 1st Circuit consolidating with 46640 as a single case filed.

1933
Mar. 6—Copy of order from 1st Circuit enlarging time to April 1, 1933 for filing record filed.
Mar. 30—Order enlarging time for transmission of record to April 22, 1933, entered.

3 Before United States Board of Tax Appeals

Docket No. 46640

HAINES FURNITURE CO. (SUBSIDIARY), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For Petitioner: J. M. Pullman, Esq. (withdrawn), Lawrence E. Green, Esq.
For respondent: C. C. Holmes, Esq.

Docket entries

See docket 46639.
1929
Dec. 17—Petition received and filed. Taxpayer notified. (Fee not paid.)
1930
Jan. 15—Order to show cause by 2/5/30 entered (fee case).
Jan. 24—Fee paid (check). Amended petition filed by taxpayer.
Jan. 27—Copy of amended petition served on general counsel.
Jan. 27—Copy of petition served on general counsel.
Feb. 24—Answer to amended petition filed by general counsel.
Mar. 8—Copy served on taxpayer—General calendar.
1932
Jan. 27—Hearing set Mar. 2, 1932.
Feb. 4—Motion to place on the Boston, Mass., circuit calendar filed by taxpayer. 2/5/32 granted.
June 17—Notice of hearing at Boston, Mass., beginning July 25, 1932.
July 25—Hearing had before Mr. C. P. Smith, division 5, on merits. Submitted. Consolidated with 46639. Stipulation of facts filed. Briefs due 45 days.
Aug. 6—Transcript of hearing of July 25, 1932, filed.
Sept. 3—Brief filed by taxpayer.
Nov. 5—Memorandum opinion rendered—Charles P. Smith, division 5. Judgment will be entered for respondent.
4 Nov. 7—Decision entered, division 5, Charles P. Smith.
Nov. 30—Praecipe for appearance of Lawrence E. Green as counsel for petitioner filed.
1933
Jan. 3—Motion to revise memorandum opinion filed by taxpayer.
Jan. 4—Order revising memorandum opinion entered.
Jan. 13—Notice of withdrawal of J. M. Pullman and request to send all notices to L. E. Green filed by Mr. Pullman.

1933
Jan. 14—Petition for review to U.S. Circuit Court of Appeals (1) with assignments of error filed by taxpayer.
Jan. 17—Proof of service filed.
Feb. 13—Stipulation to consolidate with docket 46639 for single transcript of record filed.
Mar. 3—Praecipe with proof of service thereon filed by taxpayer.
Mar. 6—Copy of order from 1st Circuit consolidating with docket 46639 filed.
Mar. 6—Copy of order from 1st Circuit enlarging time to April 1, 1933, for filing record filed.
Mar. 30—Order enlarging time for transmission and delivery of record to April 22, 1933, entered.

5 Before U.S. Board of Tax Appeals

[No. 46639. Title omitted]

Amended petition

Filed January 24, 1930

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue, as set forth in his deficiency letter IT:AR:D:CAM–60D, dated October 25, 1929, and as a basis of its appeal sets forth the following:

1. The petitioner is a Massachusetts corporation, with a principal office in Boston, Massachusetts.

2. The deficiency letter (copy of which is annexed hereto) was mailed to the petitioner on October 25, 1929.

3. The taxes in controversy are income taxes for the year 1927, and are less than $10,000, to wit, $1,434.22.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

"1. Said determination of tax represents a portion of a deficiency asserted against one of the subsidiaries of the above-named petitioner, and has been erroneously asserted against said petitioner, for said petitioner is not a transferee of said subsidiary.

"2. The basis for said determination of tax both against said petitioner and its said subsidiary is erroneous, for the Commissioner erred in disallowing a deduction from the gross income of said subsidiary, namely, Haines Furniture Company, for the year 1927 (which gross income was included in a consolidated income-tax return filed by said petitioner) an amount of $59,239.56, representing a statutory net loss sustained by said Haines Furniture Company for the period from January 1, 1925, to May 31, 1925, both dates inclusive."

5. The facts upon which said petitioner relies as a basis of its appeal are as follows:

"1. As at June 1, 1925, said petitioner acquired the entire voting capital stock of said Haines Furniture Company.

"2. Said Haines Furniture Company, which maintains books of account on a calendar year basis, sustained a net loss
6 from operations for each of the calendar years 1925 and 1926, but derived a taxable net income of $63,188.34 (exclusive of deduction for statutory net loss for the period from January 1, 1925, to May 31, 1925) for the calendar year 1927.

"3. In accordance with regulations promulgated by said respondent, said Haines Furniture Company filed a separate income-tax return for the period from January 1, 1925, to May 31, 1925, which disclosed a statutory net loss in the amount of $59,239.56.

"4. In computing its taxable net income for the calendar year 1927, said Haines Furniture Company deducted said statutory net loss of $59,239.56 for the period from January 1, 1925, to May 31, 1925, in accordance with the provisions of Section 204 of the Revenue Act of 1926."

Wherefore, said petitioner respectfully prays that this Board may hear and determine its appeal.

ABNER COHAN,
President Morgan's, Incorporated,
757 Washington Street, Boston, Massachusetts.

[*Duly sworn to by Abner Cohan; jurat omitted in printing.*]

7 TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Oct. 25, 1929.

Address reply to Commissioner of Internal Revenue and refer to Morgan's, Incorporated, 757 Washington Street, Boston, Massachusetts.

SIRS: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1927 discloses a deficiency of $1,434.22, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is

made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBERT H. LUCAS,
Commissioner.
By DAVID BURNET,
Deputy Commissioner.

Inclosures: Statement form 866–C. R. Form 882. Schedules 1, 2, and 3.

8 IT:AR:D CAM:60D

Statement of Returns Examined and Resulting Tax Liability

RETURNS EXAMINED

Parent	Years	Forms
Morgan's, Incorporated, Boston, Massachusetts	1927	1120
Subsidiary companies:		
Haines Furniture Company, Boston, Massachusetts	1927	None
Stuart Investment Trust, Incorporated, Boston, Massachusetts	1927	None

CONSOLIDATED TAX LIABILITY

Year	Corrected tax liability	Tax previously assessed	Deficiency
1927	$27,138.94	$19,141.60	$7,997.34

The adjustments producing the above-stated result are the same as shown in Bureau letter dated July 27, 1929, and are shown in the attached schedules 1, 2, and 3.

The consolidated tax assessed and corrected tax liability have been allocated to the various companies on the basis of the net income properly assignable to each as provided in section 240 of the Revenue Act of 1926.

ALLOCATION

Companies	Original		Corrected		
	Income	Tax	Income	Tax	Deficiency
Morgan's, Incorporated	$182,932.12	$18,737.14	$182,932.12	$20,171.36	$1,434.22
Haines Furniture Company	3,948.78	404.46	63,188.34	6,967.58	6,563.12
Total	186,880.90	19,141.60	246,120.46	27,138.94	7,997.34

9 SCHEDULE 1—NET INCOME HAINES FURNITURE COMPANY

Net income as disclosed by return	$3,948.78
As corrected	63,188.34
Net adjustment	59,239.56

Unallowable deductions and additional income:

(a) Net loss period January 1 to March 31, 1925, $59,239.56.

The Bureau holds inasmuch as the affiliated group subsequent to May 31, 1925, is not composed of the same corporations as made up the consolidation prior thereto, that the net loss sustained before that date cannot be applied under section 206 against the net income accrued subsequent to such date.

SCHEDULE 2—CONSOLIDATED NET INCOME, 1927

Net income as corrected:		
Haines Furniture Company (schedule 1)	$63,188.34	
Morgan's, Incorporated (reported)	182,932.12	
Total		$246,120.46
Net losses as reported:		
Stuart Investment Trust, Incorporated		45,091.27
Consolidated net income for tax purposes		201,029.19

SCHEDULE 3—COMPUTATION OF TAX, 1927 INCOME TAX

Net income for taxable year (schedule 2)		$201,029.19
Less: Net loss (section 206, acts of 1924 and 1926)		None.
Balance subject to tax		201,029.19
Income tax at 13½ percent	$27,138.94	
Tax previously assessed	19,141.60	
Additional tax to be assessed	7,997.34	

10 Before United States Board of Tax Appeals

[No. 46639. Title omitted.]

Answer to amended petition

Filed January 29, 1930

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations in paragraphs 1, 2, and 3.

4. Denies the respondent erred in the manner alleged and set forth in paragraphs 4 (a) and 4 (b).

5 (1). Admits the allegations in paragraph 5 (1).

5 (2). Denies the allegations in paragraph 5 (2).

5 (3). Admits the allegations in paragraph 5 (3).

5 (4). Denies the allegations in paragraph 5 (4).

Wherefore, it is prayed that the taxpayer's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:

W. FRANK GIBBS,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket 46640.

[(Title omitted.)]

Amended petition

Filed January 24, 1930

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue, as set forth in his deficiency letter IT:AR:D:CAM–60D, dated October 25, 1929, and as a basis of its appeal sets forth the following:

1. The petitioner is a Massachusetts corporation, with a principal office at Boston, Massachusetts.

2. The deficiency letter (copy of which is annexed hereto) was mailed to the petitioner on October 25, 1929.

11 3. The taxes in controversy are income taxes for the year 1927, and are less than $10,000, to wit, $6,563.12.

4. The determination of tax contained in the said deficiency letter is based upon the following error:

"1. The Commissioner erred in disallowing as a deduction from the gross income of the petitioner for the year 1927 (included in a consolidated income tax return for that year filed by Morgan's, Incorporated, of which the petitioner is a subsidiary) an amount of $59,239.56, representing a statutory net loss sustained by the petitioner for the period from January 1, 1925, to May 31, 1925, both dates inclusive."

5. The facts upon which said petitioner relies as a basis of its appeal are as follows:

"1. As at June 1, 1925, said Morgan's, Incorporated, acquired the entire voting capital stock of said petitioner.

"2. Said petitioner maintains books of account on a calendar year basis. It sustained a net loss from operations for each of the calendar years 1925 and 1926, but derived a taxable net income of $63,188.34 (exclusive of deduction for statutory net loss for the period from January 1, 1925, to May 31, 1925) for the calendar year 1927.

"3. In accordance with regulations promulgated by said respondent, said petitioner filed a separate income tax return for the period from January 1, 1925, to May 31, 1925, which disclosed a statutory net loss in the amount of $59,239.56.

"4. In computing its taxable net income for the calendar year 1927, said petitioner deducted said statutory net loss of $59,239.56 for the period from January 1, 1925, to May 31, 1925, in accordance with the provisions of section 204 of the Revenue Act of 1926."

Wherefore, said petitioner respectfully prays that this Board may hear and determine its appeal.

SIDNEY B. ROGAL,
Treasurer, Haines Furniture Company,
728 Washington Street, Boston, Massachusetts.

12 [*Duly sworn to by Sidney B. Rogal; jurat omitted in printing.*]

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE.
Washington, October 25, 1929.

Address reply to Commissioner of Internal Revenue and refer to Haines Furniture Company, 757 Washington Street, Boston, Massachusetts.

SIRS: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1927 discloses a deficiency of $6,563.12, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to join in executing the consolidated form 866 enclosed in a separate communication of even date addressed to Morgan's, Incorporated, Boston, Massachusetts. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of

13 interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,
Commissioner.

By ——— ———,
Deputy Commissioner.

Enclosures; Statement form 882

IT:AR:D CAM-60D

Statement of Tax Liability

Company	Years	Deficiency in tax
Haines Furniture Company, Boston, Massachusetts	1927	$6,563.12

The adjustments producing the above-stated results are shown in schedules attached to a letter addressed to Morgan's, Incorporated, Boston, Massachusetts.

Before United States Board of Tax Appeals

[Docket No. 46640. Title omitted]

Answer to amended petition

Filed February 24, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amended petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations in paragraphs 1, 2, and 3.

4. Denies the respondent erred in the manner alleged and set forth in paragraph 4.

5 (1) Admits the allegations in paragraph 5 (1).

5 (2) to 5 (4). Denies the allegations in paragraphs 5 (2) to 5 (4).

Wherefore, it is prayed that the taxpayer's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
W. FRANK GIBBS,
Special Attorney, Bureau of Internal Revenue.

14 Before United States Board of Tax Appeals

Docket Nos. 46639, 46640

MORGAN'S, INCORPORATED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

HAINES FURNITURE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

J. M. Pullman, Esq., for the petitioners.
C. C. Holmes, Esq., for the respondent.

Memorandum opinion

Entered November 5, 1932

SMITH: These proceedings consolidated for hearing are for the redetermination of deficiencies in income tax for 1927 of $1,434.22

in the case of Morgan's, Inc., docket no. 46639, and of $6,563.12 in the case of Haines Furniture Company, docket no. 46640.

The petitioners are Massachusetts corporations organized prior to 1925. They each maintain their books on a calendar year basis. They were affiliated from June 1, 1925, to the end of the year 1927.

As of June 1, 1925, Morgan's Inc., acquired the entire voting stock of the Haines Furniture Company. Morgan's, Inc., had a net income for the calendar year 1925 of $203,527.24, for the calendar year 1926 of $142,900.94, and for the calendar year 1927 of $182,932.12.

The Haines Furniture Company sustained a net loss for the period January 1, 1925, to May 31, 1925, of $59,239.56; a net loss for the period June 1, 1925, to December 31, 1925, of $61,626.69; a net loss for the calendar year 1926 of $2,551.76; and a net profit for the calendar year 1927 of $63,188.34.

For the calendar year 1925, a consolidated corporation income-tax return was filed by Morgan's, Inc., and Haines Furniture Company, which included the net profit of the former for the entire calendar year and the net loss of the latter for the entire calendar year.

15 For the year 1925, the Haines Furniture Company, in accordance with the regulations of the Commissioner, filed on March 14, 1928, a separate return for the period January 1 to May 31, 1925, which disclosed a net loss of $59,239.56; its net loss for the balance of the calendar year 1925 of $61,626.69 was included in the consolidated corporation income-tax return filed by Haines Furniture Company and Morgan's, Inc., for the calendar year 1925. For the year 1926, the net loss of the Haines Furniture Company of $2,551.76 was included in the consolidated corporation income-tax return filed by Haines Furniture Company and Morgan's, Inc. In the consolidated corporation income-tax return filed by the same companies for the calendar year 1927, the income of Haines Furniture Company of $63,188.34 was reduced by the net loss sustained by that company for the period January 1 to May 31, 1925, of $59,239.56.

No part of the net loss sustained by the Haines Furniture Company for the fractional part of the year 1925, prior to affiliation with Morgan's, Inc., has been allowed in computing the consolidated net income for the taxable period June 1 to December 31, 1925, or for the calendar years 1926 and 1927.

The deficiency determined against each petitioner for the year 1927 represents the allocation to it of the deficiency claimed to be due on the basis of net income properly assignable to each corporation as provided in section 240 of the Revenue Act of 1926.

As will appear from the foregoing, the only point in issue here is whether the Haines Furniture Company is entitled to carry forward a net loss sustained for the period January 1 to May 31, 1925, and deduct the same from net income of the Haines Furniture Company for the calendar year 1927, the company not having the benefit of

the deduction of any portion of the net loss for such period during the balance of the year 1925 or of the year 1926, it having sustained net losses in both periods. The respondent contends that the net loss may not be carried forward beyond the calendar year 1926, his contention being predicated upon the definition of the term "taxable year", as contained in section 200 of the Revenue Act of 1926.

16 The principle applicable here has been decided contraryo the petitioner's contentions in Weissberger Moving & Storage Co., Inc., 26 B.T.A. —; The Joseph & Feiss Co., 26 B.T.A. —; and Arnold Constable Corporation, 26 B.T.A. —.

Judgments will be entered for the respondent.

Before United States Board of Tax Appeals, Washington

Docket nos. 46639, 46640

[Titles omitted.]

Order correcting memorandum opinion

Entered January 4, 1933

The petitioners in the above-entitled proceedings having, on January 3, 1933, filed a motion for the correction of the memorandum opinion of the board entered November 5, 1932, and counsel for the respondent having stated that he has no objection to the granting of such motion, it is—

Ordered that the paragraph on page 2 of the memorandum opinion reading as follows:

"For the calendar year 1925, a consolidated corporation income-tax return was filed by Morgan's, Incorporated, and Haines Furniture Company, which included the net profit of the former for the entire calendar year and the net loss of the latter for the entire calendar year."

be deleted, and that there be substituted therefor the following:

"For the calendar year 1925, a consolidated corporation income-tax return was filed by Morgan's, Incorporated, and Haines Furniture Company, which included the net income of the former for the entire calendar year and the net loss of the latter for the balance of

17 the calendar year 1925, namely, from June 1, 1925, to December 31, 1925 (the net loss of the latter from January 1, 1925, to May 31, 1925, amounting to $59,239.66 was also claimed as a deduction but was disallowed)."

CHARLES P. SMITH, *Member.*

Before United States Board of Tax Appeals, Washington

Docket no. 46639

MORGAN'S, INCORPORATED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

[Entered November 7, 1932]

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered November 5, 1932, it is ordered and decided: That there is a deficiency of $1,434.22 for the year 1927.

CHARLES P. SMITH, *Member.*

Before United States Board of Tax Appeals, Washington
Docket no. 46640

HAINES FURNITURE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

[Entered November 7, 1932]

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered November 5, 1932, it is ordered and decided: That there is a deficiency of $6,563.12 for the year 1927.

CHARLES P. SMITH, *Member.*

18 In United States Circuit Court of Appeals for the First Circuit

Board of Tax Appeals

Docket no. 46639

[Title omitted.]

Petition for review and assignments of error

Filed January 14, 1933

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Morgan's, Incorporated, the petitioner in this cause, by Lawrence E. Green, attorney, and hereby files its petition for a

review by the United States Circuit Court of Appeals for the First Circuit of a decision by the United States Board of Tax Appeals rendered on November 7, 1932, determining a deficiency in the petitioner's Federal income tax for the calendar year 1927 in the amount of $1,434.22 and respectfully shows:

I. The petitioner is a Masachusetts corporation with its principal office in Boston, Massachusetts.

A consolidated corporation income tax return was filed by the petitioner and Haines Furniture Company for the calendar year 1927 with the Collector of Internal Revenue for the District of Massachusetts which is within the jurisdiction of the United States Circuit Court of Appeals for the First Circuit.

The court in which the review of these proceedings is sought is the United States Circuit Court of Appeals for the First Circuit.

II. The nature of the controversy is as follows:

The controversy involves the proper determination of the petitioner's liability for Federal income taxes for the calendar year 1927.

Prior to 1925 the petitioner and Haines Furniture Company were separate Massachusetts corporations. They each at all material
19 times maintained their books and filed income tax returns on a calendar year basis. On June 1, 1925, the petitioner acquired the entire voting stock of Haines Furniture Company.

For the year 1925 Haines Furniture Company, in accordance with the regulations of the Commissioner of Internal Revenue, filed a separate income tax return for the period January 1, 1925, to May 31, 1925, which disclosed a net loss of $59,239.56 which had been sustained by that company in that period. The Haines Furniture Company had a net loss for the balance of the calendar year 1925 of $61,626.69, which was included (together with the petitioner's net income of $203,527.24 for the calendar year 1925) in a consolidated corporation income tax return which was filed by the petitioner and Haines Furniture Company for the calendar year 1925.

For the calendar year 1926 a consolidated corporation income tax return was filed in accordance with said regulations, which included the petitioner's net income of $142,900.94 and Haines Furniture Company's net loss of $2,551.76 for that year.

For the calendar year 1927 the petitioner had a net income of $182,932.12 and Haines Furniture Company a net income of $63,188.34. In accordance with said regulations a consolidated corporation income tax return was filed by both of said corporations for the calendar year 1927. In that return as filed the net income of Haines Furniture Company, amounting to $63,188.34, was reduced to $59,239.56, the amount of the net loss sustained by Haines Furniture Company for the period from January 1, 1925 to May 31, 1925. The Haines Furniture Company had had net losses for the period June 1, 1925, to December 31, 1925, and for the calendar year 1926; and consequently no deduction was claimed or allowed

on account of the net loss of the Haines Furniture Company for the period January 1, 1925, to May 31, 1925, in computing the consolidated net income of both corporations for the periods June 1, 1925, to December 31, 1925, or for the calendar year 1926. The deduction was claimed, however, against the 1927 income of Haines Furniture Company in the consolidated corporation income tax return for the calendar year 1927.

20 The Commissioner of Internal Revenue disallowed the deduction of $59,239.56 (being the net loss of Haines Furniture Company for the period January 1, 1925, to May 31, 1925), or any part thereof, in computing the net income of Haines Furniture Company, and in computing the consolidated net income of the two corporations for the calendar year 1927, solely upon the ground that the net loss of Haines Furniture Company for the period January 1, 1925, to May 31, 1925, may not be carried forward, under section 206 (b) of the Revenue Act of 1926, beyond the end of the taxable year 1926. The Commissioner's contention rested upon the ground that the period from January 1, 1925, to May 31, 1925, constituted one taxable year of the Haines Furniture Company; that the period from June 1, 1925, to December 31, 1925, constituted the "second year" as such phrase is used in such section; that the calendar year 1926 constituted the "third year" as such phrase is used in said section; and that such deduction may not be taken beyond the end of the "third year."

This action of the Commissioner resulted in a deficiency against the petitioner in income tax for the calendar year 1927. The deficiency agains the petitioner for that year represented the allocation to it of the deficiency claimed to be due on the basis of the net income properly assignable to each of the affiliated corporations—namely the petitioner and Haines Furniture Company—as provided in section 240 of the Revenue Act of 1926. This deficiency resulted solely from the disallowance of the deduction by the Haines Furniture Company from its income for the calendar year 1927 of its net loss of $59,239.56 sustained by it during the period January 1, 1925, to May 31, 1925.

The only question is whether the period from January 1, 1925, to December 31, 1925, consists of one or two "taxable years" of the Haines Furniture Company. If it consists of one "taxable year", the net loss for the period January 1, 1925, to May 31, 1925, is deductible and the Commissioner is wrong and there is no deficiency: if it consists of two "taxable years" the net loss is not deductible and the Commissioner is right and the deficiency determined by him is proper.

21 Under date of October 25, 1929 the Commissioner of Internal Revenue sent a notice to the petitioner asserting a deficiency in the income tax due from the petitioner for the calendar year 1927 in the amount of $1,434.22.

Under date of December 16, 1929, the petitioner filed a petition with the United States Board of Tax Appeals for a redetermination of the income tax deficiency above mentioned.

After the answer of the Commissioner was duly filed and the pleadings properly completed, the case was submitted to the United States Board of Tax Appeals for decision on the basis of the pleadings and written stipulations of fact. This case was consolidated for hearing with the case of Haines Furniture Company, petitioner, Board of Tax Appeals, docket no. 46640, and a memorandum opinion of the Board of Tax Appeals was entered November 5, 1932. A decision of the Board determining that there is a deficiency of $1,434.22 in income tax due from the petitioner for the year 1927 was entered on November 7, 1932.

The memorandum opinion of the Board was revised to correct an error on January 4, 1933, but the decision was not altered.

III. Morgan's, Incorporated, the petitioner, being aggrieved by the findings of fact and conclusions of law contained in the said finding and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the First Circuit.

IV. The petitioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the period from January 1, 1925, to May 31, 1925, constituted one taxable year and the period June 1, 1925, to December 31, 1925, another taxable year of the Haines Furniture Company within the meaning of the Revenue Act of 1926, and especially within the meaning of section 206 (b) thereof.

2. The Board of Tax Appeals erred in not holding that the period January 1, 1925, to December 31, 1925, constituted one taxable year of the Haines Furniture Company within the meaning of the Revenue Act of 1926, and especially within the meaning of section 206 (b) thereof.

3. The Board of Tax Appeals erred in holding that the
22 net loss of the Haines Furniture Company, amounting to $59,239.56 for the period January 1, 1925, to May 31, 1925, is not deductible from the net income of the Haines Furniture Company, amounting to $63,188.34, in computing the consolidated net income of the petitioner and Haines Furniture Company for the calendar year 1927, and erred in not holding that the Haines Furniture Company is entitled to carry forward and deduct the same from its net income for the calendar year 1927 in computing the consolidated net income of the petitioner and Haines Furniture Company for the calendar year 1927.

4. The Board of Tax Appeals erred in finding a deficiency of $1,434.22 in income tax of the petitioner for the calendar year 1927 and in not finding that there is no deficiency due from the petitioner for such year.

Wherefore, Morgan's, Incorporated, petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law, and with the rules of said court, and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

LAWRENCE E. GREEN,
Attorney for the Petitioner,
60 State Street, Boston, Massachusetts.

[Duly sworn to by Lawrence E. Green; jurat omitted in printing.]

23 In United States Circuit Court of Appeals for the First Circuit

Board of Tax Appeals

Docket No. 46640

[Title omitted.]

Petition for review and assignments of error

Filed January 14, 1933

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Haines Furniture Company, the petitioner in this cause, by Lawrence E. Green, attorney, and hereby files its petition for a review by the United States Circuit Court of Appeals for the First Circuit of a decision by the United States Board of Tax Appeals rendered on November 7, 1932, determining a deficiency in the petitioner's Federal income tax for the calendar year 1927 in the amount of $6,563.12, and respectfully shows:

I. The petitioner is a Massachusetts corporation with its principal office in Boston, Massachusetts.

A consolidated corporation income tax return was filed by the petitioner and Morgan's, Incorporated, for the calendar year 1927 with the Collector of Internal Revenue for the District of Massachusetts, which is within the jurisdiction of the United States Circuit Court of Appeals for the First Circuit.

The court in which the review of these proceedings is sought is the United States Circuit Court of Appeals for the First Circuit.

II. The nature of the controversy is as follows:

The controversy involves the proper determination of the petitioner's liability for Federal income taxes for the calendar year 1927.

24 Prior to 1925 the petitioner and Morgan's, Incorporated, were separate Massachusetts corporations. They each at all

material times maintained their books and filed income-tax returns on the calendar year basis. On June 1, 1925, Morgan's, Incorporated, acquired the entire voting stock of the petitioner.

For the year 1925 the petitioner, in accordance with the regulations of the Commissioner of Internal Revenue, filed a separate income-tax return for the period January 1, 1925, to May 31, 1925, which disclosed a net loss of $59,239.56, which had been sustained by the petitioner in that period. The petitioner had a net loss for the balance of the calendar year 1925 of $61,626.69, which was included (together with Morgan's, Incorporated's, net income of $203,527.24 for the calendar year 1925) in a consolidated corporation income-tax return which was filed by the petitioner and Morgan's, Incorporated, for the calendar year 1925.

For the calendar year 1926, a consolidated corporation income-tax return was filed in accordance with said regulations, which included Morgan's, Incorporated's, net income of $142,900.94 and the petitioner's net loss of $2,551.76 for that year.

For the calendar year 1927 Morgan's, Incorporated, had a net income of $182,932.12 and the petitioner a net income of $63,188.34. In accordance with said regulations a consolidated corporation income-tax return was filed by both of said corporations for the calendar year 1927. In that return as filed the net income of the petitioner, amounting to $63,188.34, was reduced by $59,239.56, the amount of the net loss sustained by the petitioner for the period from January 1, 1925, to May 31, 1925. The petitioner had had net losses for the period June 1, 1925, to December 31, 1925, and for the calendar year 1926; and consequently no deduction was claimed or allowed on account of the net loss of the petitioner for the period January 1, 1925, to May 31, 1925, in computing the consolidated net income of both corporations for the periods June 1, 1925, to December 31, 1925, or for the calendar year 1926. The deduction was claimed, however, against the 1927 income of the petitioner in the consolidated corporation income-tax return for the calendar year 1927.

25 The Commissioner of Internal Revenue disallowed the deduction of $59,239.56 (being the net loss of the petitioner for the period January 1, 1925, to May 31, 1925), or any part thereof, in computing the net income of the petitioner, and in computing the consolidated net income of the two corporations for the calendar year 1927, solely upon the ground that the net loss of the petitioner for the period January 1, 1925, to May 31, 1925, may not be carried forward, under section 206 (b) of the Revenue Act of 1926, beyond the end of the taxable year 1926. The Commissioner's contention rested upon the ground that the period from January 1, 1925, to May 31, 1925, constituted one taxable year of the petitioner; that the period from June 1, 1925, to December 31, 1925, constituted the "second year" as such phrase is used in such section; that the calendar year 1926 constituted the "third year" as such phrase is used

in said section; and that such deduction may not be taken beyond the end of the "third year."

This action of the Commissioner resulted in a deficiency against the petitioner in income tax for the calendar year 1927. The deficiency against the petitioner for that year represented the allocation to it of the deficiency claimed to be due on the basis of the net income properly assignable to each of the affiliated corporations—namely the petitioner and Morgan's, Incorporated—as provided in section 240 of the Revenue Act of 1926. This deficiency resulted solely from the disallowance of the deduction by the petitioner from its income for the calendar year 1927 of its net loss of $59,239.56 sustained by it during the period January 1, 1925, to May 31, 1925.

The only question is whether the period from January 1, 1925, to December 31, 1925, consists of one or two "taxable years" of the petitioner. If it consists of one taxable year, the net loss for the period January 1, 1925, to May 31, 1925, is deductible and the Commissioner is wrong and there is no deficiency; if it consists of two taxable years the net loss is not deductible and the Commissioner is right and the deficiency determined by him is proper.

Under date of October 25, 1929, the Commissioner of
26 Internal Revenue sent a notice to the petitioner asserting a deficiency in the income tax due from the petitioner for the calendar year 1927 in the amount of $6,563.12.

Under date of December 16, 1929, the petitioner filed a petition with the United States Board of Tax Appeals for a redetermination of the income-tax deficiency above mentioned.

After the answer of the Commissioner was duly filed and the pleadings properly completed, the case was submitted to the United States Board of Tax Appeals for decision on the basis of the pleadings and written stipulations of fact. This case was consolidated for hearing with the case of Morgan's, Incorporated, petitioner, Board of Tax Appeals, docket no. 46639, and a memorandum opinion of the Board of Tax Appeals was entered November 5, 1932. A decision of the Board determining that there is a deficiency of $6,563.12 in income tax due from the petitioner for the year 1927 was entered on November 7, 1932.

The memorandum opinion of the Board was revised to correct an error on January 4, 1933, but the decision was not altered.

III. Haines Furniture Company, the petitioner, being aggrieved by the findings of fact and conclusions of law contained in the said finding and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the First Circuit.

IV. The petitioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the period from January 1, 1925, to May 31, 1925, constituted one taxable year and the period June 1, 1925, to December 31, 1925, another taxable year of the petitioner within the meaning of the

Revenue Act of 1926, and especially within the meaning of section 206 (b) thereof.

2. The Board of Tax Appeals erred in not holding that the period January 1, 1925, to December 31, 1925, constituted one taxable year of the petitioner within the meaning of the Revenue Act of 1926, and especially within the meaning of section 206 (b) thereof.

3. The Board of Tax Appeals erred in holding that the net
27 loss of the petitioner, amounting to $59,239.56, for the period January 1, 1925, to May 31, 1925, is not deductible from the 1927 net income of the petitioner, amounting to $63,188.34, in computing the consolidated net income of the petitioner and Morgan's, Incorporated, for the calendar year 1927, and erred in not holding that the petitioner is entitled to carry forward and deduct the same from its net income for the calendar year 1927 in computing the consolidated net income of the petitioner and Morgan's, Incorporated, for the calendar year 1927.

4. The Board of Tax Appeals erred in finding a deficiency of $6,536.12 in income tax of the petitioner for the calendar year 1927, and in not finding that there is no deficiency due from the petitioner for such year.

Wherefore, Haines Furniture Company petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law, and with the rules of said court, and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

LAWRENCE E. GREEN,
Attorney for the Petitioner,
60 State Street, Boston, Massachusetts.

[*Duly sworn to by Lawrence E. Green; jurat omitted in printing.*]

28 IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE First Circuit

Board of Tax Appeals

Docket no. 46639

Stipulation for consolidation

Filed February 27, 1933

It is hereby stipulated and agreed by and between the parties to the above-entitled cause through their respective attorneys as follows:

That subject to the approval of the court the aforesaid cause may be consolidated on review with the cause of Haines Furniture

Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals, docket no. 46640; that one transcript of record for the combined causes may be printed and one brief on behalf of both petitioners and one brief on behalf of the Commissioner of Internal Revenue may be filed.

In witness whereof the parties to this cause indicated in the caption hereof by their respective attorneys of record have executed this stipulation this thirty first day of January 1933.

LAWRENCE E. GREEN,
Attorney for Morgan's Incorporated, Petitioner on Review.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent on Review.

29 In United States Circuit Court of Appeals for the First Circuit

Board of Tax Appeals

Docket No. 46640

Stipulation for consolidation

Filed February 13, 1933.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause through their respective attorneys as follows:

That subject to the approval of the court the aforesaid cause may be consolidated on review with the cause of Morgan's Incorporated, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals, docket no. 46639; that one transcript of record for the combined causes may be printed and one brief on behalf of both petitioners, one brief on behalf of the Commissioner of Internal Revenue may be filed.

In witness whereof the parties to this cause indicated in the caption hereof by their respective attorneys of record have executed this stipulation this thirty-first day of January 1933.

LAWRENCE E. GREEN,
Attorney for Haines Furniture Company, Petitioner on Review.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

30 Before United States Board of Tax Appeals

Docket No. 46639

[Title omitted.]

Præcipe for the record

Filed March 3, 1933.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit, with reference to the petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of the record the following documents or certified copies thereof:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) The pleadings before the Board of Tax Appeals as follows:

(a) Amended petition filed in January 1930 with exhibits attached.

(b) Answer to amended petition.

(3) Memorandum opinion.

(4) Decision.

(5) The order entered by the Board of Tax Appeals on January 4, 1933, correcting the memorandum opinion.

(6) The petition for review with assignments of error.

(7) Stipulation, February 27, 1933.

(8) This præcipe.

LAWRENCE E. GREEN,
Attorney for Petitioner.

Service of a copy of the within præcipe is hereby admitted this twenty-eighth day of February 1933.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

31 Before United States Board of Tax Appeals

Docket No. 46640

[Title omitted.]

Præcipe for the record

Filed March 3, 1933

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the

First Circuit, with reference to the petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of the record the following documents or certified copies thereof:

1. The docket entries of all proceedings before the Board of Tax Appeals.
2. The pleadings before the Board of Tax Appeals as follows:
(a) Amended petition filed in January 1930 with exhibits attached.
(b) Answer to amended petition.
3. Memorandum opinion.
4. Decision.
5. The order entered on January 4, 1933, correcting memorandum opinion.
6. The petition for review with assignments of error.
7. Stipulation filed February 13, 1933.
8. This præcipe.

LAWRENCE E. GREEN,
Attorney for Petitioner.

Service of a copy of the within præcipe is hereby admitted this twenty-eighth day of February 1933.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

32 [Clerk's certificate to foregoing transcript omitted in printing.]

[MEMORANDUM: Orders for consolidation and of enlargement of time for docketing case to, and including, April 6, 1933, are here omitted.—A. I. CHARRON, clerk.]

33 IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October term, 1932

Re: Morgan's, Incorporated, v. Commissioner of Internal Revenue. B.T.A. No. 46639.
Haines Furniture Company v. Commissioner of Internal Revenue. B.T.A. No. 46640.

Order consolidating cases

March 3, 1933

Upon motion of petitioners, it is ordered that these cases be consolidated on appeal and be docketed as a single case in this court.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

In United States Circuit Court of Appeals

Minute entries

On August 1, 1933, motions for substitution of Guy T. Helvering, Commissioner of Internal Revenue, for David Burnet were filed and allowed.

On October 13, 1933, this consolidated cause came on to be heard, and was fully heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable Ira L. Letts, District Judge, sitting.

35 In United States Circuit Court of Appeals for the First Circuit

No. 2807. October term, 1933

MORGAN'S, INCORPORATED, ET AL., PETITIONERS FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

Appeal from the Board of Tax Appeals

Before WILSON, MORTON, and LETTS, JJ.

Opinion of the court

Filed December 15, 1933

WILSON, J. This is a petition for a review by taxpayers of an order of the Board of Tax Appeals relating to the income taxes of the affiliated petitioners for the year 1927.

Morgan's, Incorporated, hereinafter referred to as the Morgan Company, and the Haines Furniture Company, hereinafter referred to as the Haines Company, became affiliated on June 1, 1925. Both companies kept their books and made their returns on a calendar-year basis.

In 1925 the Haines Company filed a separate return for the fractional part of the year 1925, from January 1 to June 1, showing a net loss of $59,239.56. Its net loss for the balance of the calendar year 1925 was $61,626.69, which was absorbed in the consolidated return of both companies for the calendar year 1925. Its total net loss for the calendar year 1925, therefore, was $120,-866.25. In 1926 the Haines Company suffered a further net
36 loss of $2,551.76. In 1927 it showed a net income of $63,188.34, and in making the consolidated return for 1927, the loss suffered by the Haines Company during its unaffiliated period of 1925, viz: $59,239.56, was deducted from its net income in 1927.

The Commissioner refused to allow the deduction and assessed a deficiency against both companies and allocated to each its proportion of the deficiency on the basis of the net income assigned to each, as provided in sec. 240 of the 1926 Revenue Act.

The Board of Tax Appeals held that, as to the Haines Company, under sec. 200 of the 1924 and 1926 acts, the period from January 1, 1925, to May 31, 1925, constituted a taxable year and the period from May 31, 1925, to January 1, 1926, constituted a second taxable year, and therefore the calendar year 1927 was not a third taxable year in which, under sec. 206 (b), a net loss incurred in the unaffiliated part of 1925 could be deducted from its net income in 1927.

The issue as stated by both the taxpayers and the Government is whether the net loss sustained during the unaffiliated part of the year 1925 can, under sec. 204 (b) of the 1924 act, or 206 (b) of the 1926 act, be carried forward into the year 1927 and be deducted from its own net income for the calendar year 1927 in determining the net income of the affiliated companies for that year.

Stated in other words, the issue is whether the addition to sec. 200 in the 1924 and 1926 acts defining a taxable year as including "in case of a return for a fractional part of a year . . . the period for which such return is made," modifies the provisions of sec. 204 (b) of the 1924 act and 206 (b) of the 1926 act, permitting the deduction of net losses incurred in one taxable year to be carried over and deducted from the net income of the second succeeding year, if not entirely absorbed in the first succeeding year.

The language of sec. 200 of the 1924 and 1926 acts, it is true, if strictly construed, raises doubt as to its application to returns for fractional parts of years required to be made by a tax payer prior to affiliation, or after the end of affiliation, if affiliation
37 begins or ends during a fiscal or calendar year. It is, however, a well-settled principle of construction of the income tax law that in cases of doubt the construction should be resolved in favor of the taxpayer.

In the case of Commissioner v. Riley Stoker Corporation, recently decided by this court, it was held that under the 1921 Revenue Act the division of a taxable year into two parts in case of an affiliation occurring in the midst of a calendar or fiscal year, did not create two taxable years within the meaning of sec. 200 and 212 (b) of that act, or an additional taxable unit.

Notwithstanding sec. 200 of the act of 1924 and of 1926 still declares that the term "fiscal year" means an accounting period of twelve months, and, of course, a calendar year also includes a period of twelve months without legislative fiat, the Government relies on the addition in sec. 200 of the acts of the 1924 and 1926, which declares that the term "'taxable year' includes, in the case of a return for a fractional part of a year under this title or under

regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, the period for which such return is made."

Art. 634 of Treasury Regulations 65 and 69, applying respectively to the act of 1924 and 1926, provides:

"Where there are more than two corporations affiliated at the beginning of the taxable year, and due to a change in stock ownership the affiliated status of one or more is terminated, but there remain at least two corporations affiliated during the entire year, the parent or principal corporation should file a consolidated return for the entire year, excluding from its return the income of the corporations whose affiliated status is terminated from the date of the change in stock ownership; or where two or more corporations are affiliated at the beginning of the taxable year, and through change in stock ownership additional corporations become affiliated, the parent or principal corporation should file a consolidated return and include the income of such corporations from the date of change of stock ownership. In either case, the subsidiary or subordinate corporation whose status is changed during the taxable year
38 should make a separate return for that *part of the taxable year* during which it was outside of the affiliated group.

"Where, in accordance with the procedure set forth above, a return is made by a corporation for a period less than a year, the tax shall be computed in accordance with sections 226 and 239 and the articles thereunder. Where corporations become affiliated during the taxable year the separate returns of the corporations *for the portion of the taxable year* during which they were not affiliated will not be due until the fifteenth day of the third month following the close of the taxable year. For example, if two corporations become affiliated on July 1, 1926, and elect to file a consolidated return for the period from July 1 to December 31, 1926, the separate returns of the corporations covering the period from January 1 to June 30, 1926, will be due on March 15, 1927." (Italics supplied.)

It is significant that under this article the return for the unaffiliated part of the calendar year is not due until March 15 of the following year, thus adopting the construction contended for by the taxpayer in this case, that the return for the unaffiliated fractional part of a calendar year is only for a part of a taxable year. Otherwise, if such fractional part of a calendar year constituted an entire taxable year, the return for such fractional period, terminating before the end of the calendar year, would, under sec. 227 of the 1924 and 1926 acts, be due three months after the close of the fractional period and not on March 15 of the following year. Also see art. 441, regulations 69.

The proper construction of sec. 200 we think should be determined in view of the general scheme of the income-tax acts as to accounting periods, and the purpose of Congress in allowing net losses to be spread over a three-year period.

The provision allowing a spread of net loss in one year to be deducted from the net income of the two succeeding years, first appeared in the act of 1921, sec. 204 (b), though a provision was inserted in the 1918 act, sec. 204 (b), permitting net losses for any year beginning after October 31, 1918, and prior to January 1, 1920, to be deducted from the net income of the next prior year.

The purpose of both acts, it has been recognized by the
39 courts and by the Board of Tax Appeals, was to provide a relief for taxpayers who might suffer severe losses in the year immediately following the close of the war in 1918, to deduct their losses from the war profits of 1918, and to allow losses of any one year during the period of readjustment of business after the war to be spread over a period of three years, in case there was not income earned during either of the two succeeding years after the loss occurred. Sec. 200 of the 1924 and 1926 acts should be so construed as to allow the relief granted by sec. 204 (b) and 206 (b) of these acts, and not to curtail it.

The Supreme Court has construed the Income Tax Acts since 1913 as, in general, defining the accounting period as a period of twelve months. Burnet v. Sanford & Brooks Co., 282 U.S. 359, 363, in which the court said:

"All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt." Also see Woolford Realty Co., Inc., v. Rose, 286 U.S. 319, 326.

Why, then, did Congress add the further definition of a taxable year as including a shorter period and was it intended to affect the provisions of sec. 204 (b)?

The majority report of the Ways and Means Committee on the Revenue Act of 1924, H.R. 6715, when this added definition first appears, referring to sec. 200, says:

"In subdivision (a) of this section the term 'taxable year' is defined to include a period of less than a year when a return is made for such period. Under the existing law the use of the term 'taxable year' in the 'net loss' section and other sections has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the result that the benefits of such sections are denied to taxpayers who are required by law to make a return for a fractional part of a year."

Similar language was contained in the report of the Senate Committee on Finance.

40 The Commissioner of Internal Revenue had, prior to the enactment of the 1924 act, construed secs. 200 and 204 (b) of the 1921 act strictly, and held that a taxpayer beginning business or going out of business during a fiscal or calendar year, or in case of a change in the accounting period during a taxable year from a fiscal to

a calendar year, or vice versa, was not entitled to the relief provided in sec. 204 (b), and had refused to allow as a deduction in a succeeding year net losses incurred in any fractional part of a year for which the taxpayer was required to file a return, because a fractional part of a year was not a taxable year within the meaning of secs. 200 and 204 (b) of that act. Appeal of Carroll Chain Co., 1 B.T.A. 38; Appeal of Patapsco Ballast Co., 1 B.T.A. 1081; Appeal of Joe Siegel, Inc., 1 B.T.A. 1113; Appeal of Tacoma Grocery Co., 1 B.T.A. 1062, in which cases there were appeals from his decisions.

It is clear, we think, that Congress, as was indicated in the report of its committees, added the further definition of a taxable year to sec. 200 in order that a taxpayer required to make a return for a fractional part of a year, which by reason of a change in its accounting period was not a part, either of its prior or new annual accounting period, should clearly have the benefit of sec. 204 (b) as to losses suffered during that fractional period, a right which the Commissioner in his construction of sec. 200 of the 1921 act had previously denied him.

The added definition of a taxable year was in furtherance of the relief granted in sec. 204 (b) of the 1921 act, and was not intended as a curtailment thereof by shortening the period over which net losses might be spread, and to repudiate the strict construction of sec. 200 and 204 (b) previously enforced by the Commissioner.

Sec. 200 of the 1924 and 1926 acts, therefore, thould not be construed, as has been done in this case, to deprive a corporation, which has hitherto been doing business and making its return on a calendar year, and which suffered a loss during the calendar year 1925, of the right to spread that loss over the two succeeding years, because, in accordance with Treasury Regulations 69, art. 634,
41 it made a separate return of its income during the period from January 1 to May 31, 1925, having on May 31 become affiliated with another corporation and joined in a consolidated return for the period from June 1 to December 31, 1925, in which return only its loss suffered during the latter period was absorbed.

Affiliated taxpayers do not become a single taxable unit, but merely a single tax-computing unit. Woolford Realty Co. Inc. v. Rose, supra; Commissioner v. Ginsberg, 54 Fed. (2d) 238; United States v. Hoffman et al., 61 Fed. (2d) 294; Sweets Company of America, Inc. v. Commissioner, 40 Fed. (2d) 436. The Haines Company, therefore, retained its status as a separate "taxable unit" for the entire calendar year 1925. Its net losses and net income were determined by its business for the full calendar year. After affiliation its proportionate net loss absorbed in the affiliated return was, or should have been, determined in accordance with art. 634 of the regulations 65, and sec. 240 of the 1924 act.

A liberal construction of sec. 200 as amended in 1924 requires that so much of the net losses of the Haines Company during 1925 as were not absorbed in the consolidated return, should be deducted from its net income in 1927, under sec. 204 (b) of the 1924 act, and

sec. 206 (b) of the 1926 act. The fact that it became a part of another tax-computing unit on June 1, 1925, did not change its status as a taxable unit for that year. It was still a "taxable unit" for the full calendar year of 1925, which constituted its taxable year. Beneficial Loan Soc. of Bethlehem v. United States, 48 Fed. (2d) 686. (Certiorari denied 284 U.S. 633.) For an able discussion of the proper construction of sec. 200, also see the dissenting opinion of Member Van Fossan in the case of Weissberger Moving & Storage Company, Inc. v. Commissioner, 26 B.T.A. 1375, 1377.

The only case which has been called to our attention in which the court has expressed any opinion touching the issue here involved, is that of the Beneficial Loan Soc. of Bethlehem v. United States, supra, decided in the court of Claims, in which there was a
42 cessation of affiliation on May 1, 1925. A consolidated return for the period from January 1, 1925, to May 1, 1925, was filed.

The plaintiff then filed a separate return for the unaffiliated period from May 1, 1925, to January 1, 1926, its accounting period being a calendar year, and claimed only $1,500 as its prorated share under sec. 226 of the credit of $2,000 allowed corporations in its class. Afterward it claimed it should have been entitled to deduct the full credit of $2,000, which would have reduced its tax in the amount of $65.25, which it sought to recover in the action.

The court in deciding the case said:

"The plaintiff contends the return made by it from May 1, 1925, to January 31, 1926, was its first return and therefore was a 'taxable year,' and, being such, it is entitled to the full amount of the credit. But this contention is not true. The plaintiff was in existence for its entire fiscal year of twelve months, ending January 31, 1926, and previous thereto. Until May 1, 1925, plaintiff was affiliated with another corporation and the consolidated return was the return of the plaintiff until the affiliation ceased, and this is true whether the consolidated return was filed by or in the name of another corporation as the parent company. It was the return of the plaintiff as much as if it had been a separate return. Each member of the affiliated group at all times retained its separate identity and was a separate taxpayer under the statute.

* * * * * * *

"On the last date the affiliation, so far as the plaintiff was concerned, was terminated by a change in the stock ownership and the plaintiff was no longer required or permitted to include its income in an affiliated return. Under section 226 (b) of the Revenue Act of 1926, in article 634 of regs. 65 and 69, plaintiff was required to make and file a separate return for the period May 1, 1925, the date of the termination of the affiliation, to the end of its taxable year, January 31, 1926.

* * * * * * *

"The separate return filed by the plaintiff for the period of May 1, 1925, to January 31, 1926, was not a return for a 'taxable year' any more than was the consolidated return for three months of the plaintiff's fiscal year a return by it for a taxable year. Under the facts there was merely a change in the basis of reporting net income which required the plaintiff to file a return for a fractional part of a year."

It is true that the spreading of net losses was not involved in the case, but we think the court by a parity of reasoning would, upon the same facts as exist in the case now at bar, deduct the loss suffered by the Haines Company in the period from January 1 to June 1, 1925, from its net income in 1927.

The order of the Board of Tax Appeals is set aside and the case is remanded to that Board for further proceedings not inconsistent with this opinion.

In United States Circuit Court of Appeals

Final decree

December 15, 1933

This consolidated cause came on to be heard upon the record upon petitions for review of the United States Board of Tax Appeals, and was argued by counsel:

Upon consideration whereof, it is now, to wit, December 15, 1933, here ordered, adjudged, and decreed as follows: The order of the Board of Tax Appeals is vacated and the case is remanded to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on January 15, 1934, mandate issued to the Board of Tax Appeals.

[Clerk's Certificate to foregoing transcript omitted in printing.]

In Supreme Court of the United States

Order extending time within which to apply for a writ of certiorari

Filed Feb. 26, 1934

On consideration of the motion of counsel for the petitioner in the above-entitled cause, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same hereby is, extended for a period of sixty days from March 15, 1934.

Dated this 24th day of February 1934.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

49 Supreme Court of the United States

Order allowing certiorari. Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 38507. U.S. Circuit Court of Appeals, First Circuit. Term No. 12. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Morgan's, Incorporated, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 29, 1934. File No. 904 O.T. 1933.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5
Appendix A	10
Appendix B	14

CITATIONS

Cases:	
American LaDentelle, Inc., v. *Commissioner*, 1 B.T.A. 575	7
American Paper Exports v. *Bowers*, 54 F. (2d) 508	8
Arnold Constable Corp. v. *Commissioner*, 26 B.T.A. 1427, reversed March 12, 1934, C.C.A., (2d)	5, 8
Dalton v. *Bowers*, 287 U.S. 404	6
Green River Distilling Co. v. *Commissioner*, 16 B.T.A. 395	7–8
Joseph & Feiss Co. v. *Commissioner*, 26 B.T.A. 1424	8
Weissberger Moving & Storage Co. v. *Commissioner*, 26 B.T.A. 1375	8
Wishnick-Tumpeer, Inc., v. *Commissioner*, App. D.C., decided March 12, 1934	5
Woolford Realty Co. v. *Rose*, 286 U.S. 319	6, 21–22
Statutes:	
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 00 (U.S.C. App., Title 26, Sec. 931)	10
Sec. 206 (U.S.C. App., Title 26, Sec. 937)	10
Sec. 226 (U.S.C. App., Title 26, Sec. 968)	11
Sec. 240 (U.S.C. App., Title 26, Sec. 993)	11
Sec. 286 (U.S.C. App., Title 26, Sec. 941)	10
Treasury Regulations 69, promulgated under the Revenue Act of 192 :	
Ar . 634	12
Art. 1523	13

47403—34——1

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

MORGAN'S, INCORPORATED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on December 15, 1933.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14–16) is unreported. The opinion of the Circuit Court of Appeals for the First Circuit (R. 34–39) is reported in 68 F. (2d) 325.

JURISDICTION

The judgment below was entered December 15, 1933 (R. 40). On February 24, 1934, Mr. Justice Brandeis entered an order extending the time for the filing of a petition for a writ of certiorari for sixty days from March 15, 1934 (R. 40). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where two pre-existing corporations become affiliated during a normal taxable year of twelve months and thereafter file a consolidated return for the period of affiliation, does such action divide the twelve-months' period into two taxable years for the purpose of applying the net loss provisions of Section 206 of the Revenue Act of 1926?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra,* pp. 10–13.

STATEMENT

The facts found by the Board of Tax Appeals (R. 14–15, 16–17) may be summarized as follows:

Morgan's, Incorporated, and Haines Furniture Company are Massachusetts corporations, organized prior to 1925. On June 1, 1925, Morgan's, Incorporated, acquired all of the outstanding voting stock of Haines Furniture Company and thereafter the two companies filed a consolidated return

for the full calendar year 1925, reporting the net income of Morgan's, Incorporated, and the net loss of the Haines Furniture Company for the full calendar year (R. 14).

During the years 1925, 1926, and 1927 Morgan's, Incorporated, had net incomes of $203,527.24, $142,900.94, and $182,932.12, respectively. For the periods January 1, 1925, to May 31, 1925, June 1, 1925, to December 31, 1925, and the year 1926, the Haines Furniture Company had net losses of $59,239.56, $61,626.69, and $2,551.76. During the year 1927 it had a net income of $63,188.34. (R. 14.) On March 14, 1928, the Haines Furniture Company filed a separate return for the period January 1 to May 31, 1925, showing its net loss of $59,239.56. Its net loss of $61,626.69 for the balance of the year 1925 was included in the consolidated return and used as a deduction from Morgan's, Incorporated, net income for that period. Similarly, the net loss of Haines Furniture Company for 1926 was included in the consolidated return filed for 1926 and used to reduce Morgan's, Incorporated, net income for that year. In the consolidated return for 1927, the Haines Furniture Company sought to bring forward its net loss of $59,239.56 sustained during the period January 1 to May 31, 1925, and deduct this sum from its $63,188.34 net income for 1927. (R. 15.)

The Commissioner disallowed the deduction (R. 9) and determined a deficiency accordingly (R. 7). Appeal was taken to the Board of Tax

Appeals (R. 5–12), where the Board held that by becoming affiliated on June 1, 1925, and filing a consolidated return for the remainder of the year, the calendar year was divided into two taxable years, within the meaning of Sections 200 and 206 of the Revenue Act of 1926, and therefore the year 1926 constituted the second and last taxable year to which the loss for the first part of 1925 could be carried (R. 14–16). On petition for review, the Circuit Court of Appeals for the First Circuit held that the calendar year 1925 was not divided into two taxable years, and accordingly reversed the decision of the Board of Tax Appeals (R. 34–39).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the First Circuit erred—

(1) In holding that the definition of the term "taxable year" as found in Section 200 of the Revenue Act of 1926 applies to the term "taxable year" as used in the first part of the first sentence of Section 206 (b), but not to the same term as twice used in the latter part of the same sentence.

(2) In holding that the calendar year 1925 was not divided into, and did not consist of two "taxable years", for the purpose of applying the net loss provisions of Section 206 to the computation of the net income of the Haines Furniture Company for the year 1927.

(3) In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the decision of the Court of Appeals of the District of Columbia in *Wishnick-Tumpeer, Inc.*, v. *Commissioner*, decided March 12, 1934.[1] The opinion in this case is not yet reported, but a copy is printed as Appendix B to this petition (*infra*, pp. 14–23). Although the *Wishnick-Tumpeer* case arose under the Revenue Act of 1928, and involved the provisions of Regulations 75, there is, we submit, no basis of distinction between the two cases on this ground. In each case the ultimate question is the meaning of the word "taxable year" as used in the applicable section of the statute.

There are other cases pending in other Circuit Courts of Appeals. The question is one of general importance which frequently arises, and which should be finally determined by this Court.

2. The decision below is erroneous, representing an unwarranted extension of the express provisions of the statute.

The right of the Haines Furniture Company to deduct in 1927 a loss sustained by it in 1925 must

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[1] On the same date the Circuit Court of Appeals for the Second Circuit handed down its opinion in *Arnold Constable Corp.* v. *Commissioner*, following the opinion of the court below in the present case. A motion for a rehearing to stay the finality of the judgment in the *Arnold Constable* case pending the disposition of the present case is being filed.

be found in a specific provision of the statute or it does not exist. *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 326; *Dalton* v. *Bowers,* 287 U.S. 404, 409. The only statute to which respondents may point is Section 206 (b) of the Revenue Act of 1926. That section provides:

> If, for any *taxable year,* it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding *taxable year* (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding *taxable year* (hereinafter in this section called "third year"); * * *. (Italics ours.)

The term "taxable year" is specifically defined by Section 200 of the Revenue Act of 1926 as follows:

> The term "taxable year" includes, *in the case of a return made for a fractional part of a year* under the provisions of this title or *under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.* * * * (Italics ours.)

Article 634 of Regulations 69, promulgated under this section, provides that—

> (b) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.
>
> Ordinarily in such cases, where only two corporations are involved * * * under the conditions described in (b) above, *each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of change of stock ownership to the end of the taxable year,* including therein the income of the subsidiary or subordinate corporation for such period. (Italics ours.)

Here the two corporations were not affiliated at the beginning of the year, but through a change of stock ownership became affiliated on June 1, 1925. They filed a consolidated return for the entire year but later the Haines Furniture Company, in compliance with the regulations, filed a separate return for the period January 1 to May 31, 1925.[2] Thus the Haines Furniture Company was required to,

[2] The Board of Tax Appeals has uniformly held that the filing of such a separate return was required. *American LaDentelle, Inc.*, v. *Commissioner*, 1 B.T.A. 575; *Green*

and it did, file a separate return for the period January 1 to May 31, 1925, and the two companies filed a consolidated return for the period June 1 to December 31, 1925. Accordingly, the calendar year 1925 was divided into two " taxable years " under the plain provisions of Section 200, *supra*.[3] The Board therefore held that the calendar year 1926 became the "third taxable year", within the meaning of Section 206, for the purpose of applying the 1925 net loss and consequently that the 1925 net loss could not be carried forward to the taxable year 1927.

The Circuit Court of Appeals, however, held that the term "taxable year", as used in the first part of the first sentence of Section 206 (b), means any period of less than twelve months for which a return is required to be made by the regulations; but that the same phrase as used twice again in the same sentence means a full period of twelve months only. We submit that there is no justification for

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River Distilling Co. v. *Commissioner*, 16 B.T.A. 395; *Weissberger Moving & Storage Co.* v. *Commissioner*, 26 B.T.A. 1375; *Joseph & Feiss Co.* v. *Commissioner*, 26 B.T.A. 1424, now pending on appeal in the Circuit Court of Appeals for the Sixth Circuit, No. 6386; *Arnold, Constable Corp.* v. *Commissioner*, 26 B.T.A. 1427, reversed by the Circuit Court of Appeals for the Second Circuit on March 12, 1934. See also *American Paper Exports* v. *Bowers*, 54 F. (2d) 508, 509 (C.C.A. 2d).

[3] This conclusion is also fortified by the provisions of Section 226 (b) (made applicable to corporations by Section 239) and by Article 1523 of Regulations 69.

such a distorted meaning of the plain provisions of the statute.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1934.

APPENDIX A

Statutes and Regulations Involved

Revenue Act of 1926,[4] c. 27, 44 Stat. 9

Sec. 200. When used in this title—

(a) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calandar year 1925. (U.S.C.App., Title 26, Sec. 931.)

Sec. 206. (b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (herein-

[4] Effective as of Jan. 1, 1925; see Section 286 of the Revenue Act of 1926.

after in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary. (U.S.C.App., Title 26, Sec. 937.)

SEC. 226. (b) Where a separate return is so made, and in all other cases where a separate return is required or permitted, by regulations prescribed by the Commissioner with the approval of the Secretary, to be made for a fractional part of a year, then the income shall be computed on the basis of the period for which separate return is made. (U.S.C.App., Title 26, Sec. 968.)

SEC. 240. (a) Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated cor-

porations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236. (U.S.C.App., Title 26, Sec. 933.)

TREASURY REGULATIONS 69, PROMULGATED UNDER THE REVENUE ACT OF 1926

ART. 634. *Change in ownership during taxable year.*—(a) Where corporations are affiliated at the beginning of a taxable year but due to a change in stock ownership during the year the affiliated status is terminated, or (b) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.

Ordinarily in such cases, where only two corporations are involved, the parent or principal corporation, under the conditions described in (a) above, should file a consolidated return including the income of such subsidiary or subordinate corporation to the date of the change of stock ownership, and each should file a separate return from the date of such change in stock ownership to the end of the taxable period, and, under the conditions described in (b) above, each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of

change of stock ownership to the end of the taxable year, including therein the income of the subsidiary or subordinate corporation for such period.

* * * * *

Where, in accordance with the procedure set forth above, a return is made by a corporation for a period less than a year, the tax shall be computed in accordance with sections 226 and 239 and the articles thereunder. Where corporations become affiliated during the taxable year the separate returns of the corporations for the portion of the taxable year during which they were not affiliated will not be due until the fifteenth day of the third month following the close of the taxable year. * * *

ART. 1523. *"Taxable year", "withholding agent", "paid or incurred", and "paid or accrued."*—The taxable year is the time unit for the purpose of the tax. The term includes, in the case of a return made for a fractional part of a year under these regulations, the period for which the return is made. (See section 212 and article 22.) * * *.

APPENDIX B

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 6015

Wishnick-Tumpeer, Inc., petitioner

v.

Guy T. Helvering, Commissioner of Internal Revenue, respondent

On Petition for Review of Decision of the United States Board of Tax Appeals

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(*Argued February 7, 1934. Decided March 12, 1934*)

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

GRONER, *Associate Justice:* Petitioner, whom we shall call Tumpeer, was an Illinois corporation, and, prior to November 1, 1928, and thereafter, owned in excess of 95 percent of the stock of Pioneer Asphalt Company, also an Illinois corporation, whom we shall call Pioneer. Both Tumpeer and Pioneer filed separate returns for the taxable year 1928 on the basis of their regular accounting periods, which were, as to Tumpeer, the calendar year, and, as to Pioneer, the fiscal year ending October 31. Tumpeer on May 28, 1929, asked for and was granted permission by the Commissioner

to change its taxable year from the calendar year to a fiscal year ending June 30, with a provision in such permit that in order to effect the change Tumpeer would be required to file a return on or before September 15, 1929, covering the period January 1, 1929, to June 30, 1929. Tumpeer, with the consent of Pioneer, duly filed a consolidated return for the period ending June 30, 1929. This return included its net income for the period January 1 to June 30, 1929, the net income of another affiliate whom we need not notice, and the net income of Pioneer for the eight months' period November 1, 1928, to June 30, 1929. In computing the income of Pioneer, there was deducted a net loss admittedly sustained by that company for the fiscal year ending 1927, no portion of which had been used to offset its income for the taxable year ended October 31, 1928. Tumpeer deducted this net loss from the income of Pioneer for the period November 1, 1928, to June 30, 1929. The Commissioner held that this was not permissible and apportioned the income for the eight months' period between the two months November and December 1928, and the six months, January to July 1929, and allowed the 1927 net loss against the income allocated to November and December, but denied the right to offset the remainder against the income for the period January to July 1929. The effect of this was to reduce the allowable deduction in computing the consolidated taxable net income for the year ended June 30, 1929. The Commissioner accomplished this result by treating the period November and December 1928 as a separate taxable year.

The single question, therefore, we have to determine is whether his action in this respect was correct. The answer to this involves an examination of the provisions of the income-tax laws as to accounting periods, particularly with reference to those allowing net losses to be spread over a three-year period, and, more particularly, with reference to the Revenue Act of 1928 so far as it relates to the right of affiliated corporations to file a consolidated return. The act in specific terms (section 141 (a); 45 Stat. 831; 26 U.S.C.A. sec. 2141 (a)) extends the privilege upon the condition that all the corporations for which the return is made "consent to all the regulations under subsection (b) prescribed prior to the making of such return." Subsection (b) (45 Stat. 831; 26 U.S.C.A. sec. 2141 (b)) reads as follows:

> The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and prevent avoidance of tax liability.

The Commissioner, acting under the authority of the statute, promulgated certain rules in relation to the subject, known as Regulations 75. One of such rules (art. 14) entitled "Accounting Period of an Affiliated Group", reads as follows:

> The taxable year of the parent corporation shall be considered as the taxable year of an affiliated group which makes a con-

> solidated return, and the consolidated net income must be computed on the basis of the taxable year of the parent corporation.

Another (art. 13 (g)) reads:

> If a corporation, during its taxable year, becomes a member of an affiliated group, its income for the portion of such taxable year not included in the consolidated return of such group must be included in a separate return.

And still another (art. 41 (d)) reads:

> Any period of less than 12 months for which either a separate return or a consolidated return is filed * * *, shall be considered as a taxable year.

We have, therefore, here a case in which corporations, though affiliated, had consistently filed separate returns. In the case of the parent corporation, the basis of its accounting period was the calendar year, and in the case of its affiliate the fiscal year ending October 31. After the passage of the 1928 law, Tumpeer (the parent company) asked for and received permission to change its accounting period for 1929 from the calendar year to the fiscal year ending June 30. It had filed a separate return for the calendar year January 1 to December 31, 1928. Its return period, therefore, for the taxable year 1929 was January 1 to June 30, and this period, giving effect to the regulation of the Commissioner quoted above, likewise determined the taxable year of its affiliates. It was therefore ruled by the Commissioner that the act and the regulations required that Pioneer must file, or be treated as having filed, a separate return for the period between the end of its former sep-

arate return period and the commencement of the taxable year of its parent, i.e., November and December 1928.

The position of Tumpeer is that the term "taxable year" as used in section 117 of the Revenue Act of 1928 does not mean a fraction of a year, as the Commissioner contends, but does mean a full twelve months' period, and that since a corporation retains its separate entity as a taxpayer irrespective of affiliation, the latter state cannot, under any regulation of the Commissioner, deprive it of the right to deduct for two succeeding years its own net loss from its own net gain.

Section 117 (b) (45 Stat. 825; 26 U.S.C.A. sec. 2117 (b)) provides:

> If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

This position of Tumpeer is the crux of the case.

The net loss-extension provision was first inserted in the Revenue Act of 1918, and has continued practically unchanged, except that in 1921

the right to make the deduction was extended from the next succeeding year to the next two succeeding years, and it was not until the Revenue Act of 1924 that the term "taxable year" was defined, but in that act and in succeeding acts, including the act of 1928, "taxable year" was defined to include, in the case of a return made for a fractional part of a year, the period for which such return was made. (Sec. 48 (a); 45 Stat. 807; 26 U.S.C.A. sec. 2048 (a)).

Tumpeer insists, however, that the legislative history and the reports of the committees of Congress indicate that the congressional intent in thus defining the term was to broaden rather than to narrow the rights of taxpayers; that the provision was inserted as a measure of relief for taxpayers required by uncontrollable circumstances to make a return for a period of less than a full year; and that it was never intended to limit the period of the loss carryover under two years of twelve months each. In short, it is argued that Congress, first of all, extended the loss deduction period two years, and then, to make it apply in the case of a taxpayer commencing operation within the year, or discontinuing or dissolving, defined the term "taxable year" as the period for which a return was made—though less than twelve months—to include within its provisions taxpayers thus circumstanced. And so it is insisted here it never was intended to limit the carryover period, or deny its benefits to a taxpayer voluntarily but as the result of affiliation changing its accounting period. So it is said that since each taxpayer remains such in his own right, the accounting practice of each corporation at the

commencement of affiliation should be followed, though it involves separate returns for different periods of the year, and that each such corporation in such circumstances is entitled to its own deductions for its accounting period, because otherwise the mere fact of affiliation would deprive it of the rights granted by the net-loss provisions of the statute.

The argument is plausible, and the question is not without difficulty, for it is undeniable that Pioneer, had it continued to file a separate return, would have been entitled to deduct the losses of 1927 in its return for its fiscal year November 1, 1928, to November 1, 1929, and it is equally undeniable that, if the Commissioner's position is correct, the making of a consolidated return has lost it this right, for the Commissioner's ruling is to take away from it something which in its state before affiliation the law gave it, and this brings us back to the questions, first, whether the interpretation of the regulations by the Commissioner is correct, and, second, if correct, whether the regulations themselves are valid.

To answer these questions we look to the statute. First, was the Commissioner correct in requiring a separate return from Pioneer for the two months' period ending December 31, 1928? The answer to this is that the Commissioner's regulation (article 14, regulations 75) specifically so provides, for it says that the taxable year of the parent corporation shall be also the taxable year of the affiliates, and since, as appears already, the first taxable year of Tumpeer under the consolidated status began January 1, 1929, it is perfectly clear that the regulation

required its affiliates to make their returns on the same basis of time. In the case of Pioneer this left an unaccounted-for period. Obviously some sort of return was necessary to cover this period, and that it should be a separate return seems to us to be specifically required in (g) of article 13 of regulations 75, which provides: "If a corporation, during its taxable year, becomes a member of an affiliated group its income for the portion of such taxable year not included in the consolidated return of such group must be included in a separate return." Little more need be said as to this. Here Pioneer's taxable year was the fiscal year November 1 to October 31. In September 1929 it consented in writing to the filing by Tumpeer of a consolidated return, and likewise it agreed to be bound by the Commissioner's rules. This of course was an assent to a change of its taxable year period to conform to that of Tumpeer, its parent. It was, therefore, an agreement "during its taxable year" to become a member of an affiliated group for the purpose of filing consolidated returns, and, by the express terms of the provision of the regulations, it became its duty to cover the intermediate period, that is to say, the period from its last return to the commencement of the new consolidated tax year, by filing a separate return, and since Congress specifically extended the privilege of filing a consolidated return on condition that the corporations availing of it should thereby consent to all the regulations the Commissioner may prescribe, it is plain to us the taxpayer may not now question the rules of the Commissioner. As was said by the Supreme Court in *Woolford Realty Company* v. *Rose,* 286

U.S. 319, 330–31; "The Revenue Act of 1928 (section 141b) protects against unfair evasions in the making of consolidated returns by increasing the discretionary power of the Commissioner in prescribing regulations." The authority of course must be used fairly and so as not to do any violence to the provisions of the statute, but having regard to the possibilities which the contention of the taxpayer here would lead to in the way of extending the return beyond even the two-year period, we are convinced that, in requiring a separate return and in treating the period embraced within it as one of the two years permitted for the loss carry-over, nothing in the regulations can be said to be violative of the intent of Congress under the provisions of section 117 (b) supra. By both statute and regulations (act 1928, sec. 48 (a), supra; reg. 75, art. 41 (d)) the taxable year is defined to be the period for which a return is filed, though only a fractional part of the year. The language is plain, and there is no need for resort to any other source to discover its meaning. The argument of Tumpeer would require us to reject the ordinary rule of interpretation and to say that the words used should be given no effect because to do so would defeat the obvious purpose of Congress to permit net losses to be spread over a full three-year period. This we do not feel we may properly do.

Tumpeer as a second point suggests that, since admittedly Pioneer might have taken the entire loss without question by filing a separate return, the rejection by the Commissioner of the return filed is in effect a decision that it had not assented to the filing of a consolidated return; in other words,

that the only return it consented to file was the one it actually filed, which was a single return for the entire period November 1, 1928, to June 30, 1929, whereas the ruling of the Commissioner that it should have filed two returns, one covering the two months and the other the six months' period, is the equivalent of saying that it had not complied with the regulations and had not filed a consolidated return. It is argued from this that the return filed should be treated as a separate return, in other words, that having filed what it believed to be a consolidated return under a misapprehension of its rights, it had a right when apprized of this fact to have its return treated as a separate return; but we think there is nothing in this point. We find in the decision of the Board that Pioneer duly authorized and consented to the filing of a consolidated return on its behalf. This was a binding election, and is not recallable because Pioneer misunderstood the requirements to effectuate the purpose.

The finding and conclusion of the Board are affirmed.

Affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1934

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	4
Summary of argument	5
Argument	8
Conclusion	21
Appendix (Statutes and regulations involved)	22

CITATIONS

Cases:

American La Dentelle, Inc. v. *Commissioner*, 1 B.T.A. 575	10
American Paper Exports v. *Bowers*, 54 F. (2d) 508	10
Arnold Constable Corp. v. *Commissioner*, 26 B.T.A. 1427, reversed, 69 F. (2d) 788	7, 10, 20
Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U.S. 427	11
Beneficial Loan Soc. v. *United States*, 48 F. (2d) 686, certiorari denied, 284 U.S. 633	7, 19
Beneficial Loan Society v. *Commissioner*, 70 F. (2d) 288	20
Boggs-Rice Co., In re, 66 F. (2d) 855	13
Burnet v. *Chicago Portrait Co.*, 285 U.S. 1	13
Caminetti v. *United States*, 242 U.S. 470	13
Carroll Chain Co. v. *Commissioner*, 1 B.T.A. 38, affirmed, 8 F. (2d) 529	14
Chess & Wymond Co. v. *Lucas*, 33 F. (2d) 793	16
Commissioner of Immigration v. *Gottlieb*, 265 U.S. 310	12
Commissioner v. *Riley Stoker Corp.*, 67 F. (2d) 688	16
Corrugated Bar Co., Inc. v. *Gage*, 58 F. (2d) 360	16
Dalton v. *Bowers*, 287 U.S. 404	8
De Haven Mfg. Co. v. *United States*, 31 F. (2d) 999	16
Dorsey Drug Co. v. *Commissioner*, 7 B.T.A. 229	15
Durabilt Steel Locker Co. v. *Commissioner*, 5 B.T.A. 239	14
Edwards v. *Douglas*, 269 U.S. 204	13
Flint v. *Stone Tracy Co.*, 220 U.S. 107	12
General Box Corp. v. *Commissioner*, 22 B.T.A. 725	15
Green River Distilling Co. v. *Commissioner*, 16 B.T.A. 395	10
Joseph & Feiss Co. v. *Commissioner*, 26 B.T.A. 1424, reversed, 70 F. (2d) 804	7, 10, 20

81869—34——1

Cases—Continued. Page

Lewellyn v. *Harbison*, 31 F. (2d) 740, certiorari denied, 280 U.S. 560 11
Ozawa v. *United States*, 260 U.S. 178 12
Pampanga Mills v. *Trinidad*, 279 U.S. 211 11
Pennsylvania Chocolate Co. v. *Lewellyn*, 27 F. (2d) 762 16
Sterling Oil & Gas Co. v. *Lucas*, 51 F. (2d) 413 16
Stimpson Computing Scale Co. v. *Lucas*, 39 F. (2d) 473 16
Tacoma Grocery Co. v. *Commissioner*, 1 B.T.A. 1062 ..... 15, 17
Turners Falls Power & Electric Co. v. *Commissioner*, 9 B.T.A. 435 15
United States v. *Brunett*, 53 F. (2d) 219 11
United States v. *Hartwell*, 6 Wall. 385 13
United States v. *Hoffman*, 61 F. (2d) 294 16
United States v. *Shreveport Grain & El. Co.*, 287 U.S. 77 13
Walker & Co., Arthur, v. *Commissioner*, 4 B.T.A. 151 ..... 15, 17
Weissberger Moving & Storage Co. v. *Commissioner*, 26 B.T.A. 1375 10
Wishnick-Tumpeer, Inc., v. *Commissioner*, Vol. I, Prentice-Hall, 1934, p. 975 ..... 7, 10, 20
Woolford Realty Co. v. *Rose*, 286 U.S. 319 8
Wright & Kremers, Inc. v. *United States*, 3 F. Supp. 616 16

Statutes:
Revenue Act of 1918, c. 18, 40 Stat. 1057:
Sec. 200 13
Sec. 204 13
Revenue Act of 1921, c. 136, 42 Stat. 227:
Sec. 200 14
Sec. 204 14
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 200 (U.S.C., Title 26, Sec. 931) 16
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 200 (U.S.C.App., Title 26, Sec. 931) 22
Sec. 206 (U.S.C.App., Title 26, Sec. 937) 22
Sec. 226 (U.S.C.App., Title 26, Sec. 968) 23
Sec. 239 (U.S.C. App., Title 26, Sec. 991) 10
Sec. 240 (U.S.C.App., Title 26, Sec. 993) 23
Sec. 286 (U.S.C.App., Title 26, Sec. 941) 22

Miscellaneous:
H.Rep. 179, 68th Cong., 1st sess., p. 10 16
Treasury Regulations 69, promulgated under the Revenue Act of 1926:
Art. 634 24
Art. 1523 24

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 12

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

MORGAN'S, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 9–11) is unreported. The opinion of the Circuit Court of Appeals for the First Circuit (R. 23–29) is reported in 68 F. (2d) 325.

JURISDICTION

The judgment below was entered December 15, 1933 (R. 29). On February 24, 1934, Mr. Justice Brandeis entered an order extending the time for the filing of a petition for a writ of certiorari for

sixty days from March 15, 1934 (R. 29). The petition for a writ of certiorari was filed March 29, 1934, and was granted April 30, 1934 (R. 30). Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where two pre-existing corporations became affiliated during a normal taxable year of twelve months and thereafter filed a consolidated return for the period of affiliation, did such action divide the twelve-months' period into two "taxable years" for the purpose of applying the net loss provisions of Section 206 of the Revenue Act of 1926?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 22–25.

STATEMENT

The facts found by the Board of Tax Appeals (R. 10) may be summarized as follows:

Morgan's, Incorporated, and Haines Furniture Company are Massachusetts corporations, organized prior to 1925. On June 1, 1925, Morgan's, Incorporated, acquired all of the outstanding voting stock of Haines Furniture Company, and thereafter the two companies filed a consolidated return for the full calendar year 1925, reporting the net income of Morgan's Incorporated, and the net loss

of the Haines Furniture Company for the full calendar year.

During the years 1925, 1926, and 1927 Morgan's, Incorporated, had net incomes of $203,527.24, $142,900.94, and $182,932.12, respectively. For the periods January 1, 1925, to May 31, 1925; June 1, 1925, to December 31, 1925; and the year 1926 the Haines Furniture Company had net losses of $59,239.56, $61,626.69, and $2,551.76. During the year 1927 it had a net income of $63,188.34. On March 14, 1928, the Haines Furniture Company, pursuant to the applicable regulations, filed a separate return for the period January 1 to May 31, 1925, showing its net loss of $59,239.56. Its net loss of $61,626.69 for the balance of the year 1925 was included in the consolidated return and used as a deduction from the net income of Morgan's, Incorporated, for that period. Similarly the net loss of Haines Furniture Company for 1926 was included in the consolidated return filed for 1926 and used to reduce the net income of Morgan's, Incorporated, for that year. In the consolidated return for 1927 the Haines Furniture Company sought to bring forward its net loss of $59,239.56 sustained during the period January 1 to May 31, 1925, and deduct this sum from its $63,188.34 net income for 1927.

The Commissioner disallowed the deduction and determined a deficiency accordingly. Appeal was taken to the Board of Tax Appeals, which held that

by reason of the affiliation on June 1, 1925, and the filing of a consolidated return for the remainder of the year, the calendar year was divided into two taxable years within the meaning of Sections 200 and 206 of the Revenue Act of 1926, and therefore the year 1926 constituted the second and last taxable year to which the loss for the first part of 1925 could be carried (R. 11). On petition for review, the Circuit Court of Appeals for the First Circuit held that the calendar year 1925 was not divided into two taxable years, and accordingly reversed the decision of the Board of Tax Appeals. This Court granted certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the First Circuit erred—

(1) In holding that the definition of the term "taxable year" as found in Section 200 of the Revenue Act of 1926 applies to the term "taxable year" as used in the first part of the sentence constituting Section 206 (b), but not to the same term as twice used in the latter part of the same sentence.

(2) In holding that the calendar year 1925 was not divided into, and did not consist of, two "taxable years" for the purpose of applying the net loss provisions of Section 206 to the computation of the net income of the Haines Furniture Company for the year 1927.

(3) In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

Section 206 (b) of the Revenue Act of 1926 (*infra*, p. 22) provides that a net loss sustained for any "taxable year" shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding "taxable year", and that if the net loss exceeds the net income for such year the excess may be deducted in the next succeeding "taxable year." The term "taxable year" is defined in Section 200 (*infra*, p. 22) as including a fractional part of a year for which a return is made under the statute or under regulations duly promulgated.

The Haines Furniture Company became affiliated with Morgan's, Inc., on June 1, 1925. Under Article 634 of Regulations 69 (*infra*, p. 24) the Haines Furniture Company was required to file a separate return of its income for the five months of 1925 preceding the affiliation, and it did file such a return in 1928. The period January 1 to May 31, 1925, was therefore a "taxable year" within the plain meaning of Sections 200 and 206 (b), and the company was clearly entitled to, and did, compute a net loss for that period. Similarly, the period June 1 to December 1, 1925, was a "taxable year" and was the "succeeding taxable year" within the meaning of the statute. It follows that the calendar year 1926 was the "next succeeding taxable year", and the last year in which the net loss sustained in the first five months of 1925 could be deducted. The Board of Tax Appeals so held, and we submit its decision was correct.

The court below held, in effect, that although the definition of "taxable year" in Section 200 applies to those words as used in Section 206 (b) to specify the period for which a net loss may be computed, it does not apply to them as used twice again in the same section to designate the periods in which a net loss may be deducted from income. We submit that in so holding the court violated an elementary principle of statutory construction, namely, the principle that a word used several times in the same section of a statute will be regarded as having the same meaning each time. Congress did not limit the application of its definition of "taxable year", and we think there is no justification for refusing to apply that definition uniformly throughout the section here involved.

The decision below was based on inferences drawn from the legislative history of Section 200. But extrinsic aids to interpretation may not be invoked when the statute is as unambiguous as it is here. Moreover, the committee report to which the court referred is far from clear and does not warrant the inference which the court drew from it regarding the intent of Congress. True, the report indicates that the amendment to Section 200, including in the definition of "taxable year" a fractional part of a year for which a return is filed, was intended primarily to benefit taxpayers. It does not, however, specify in what respect taxpayers were to be benefited. The Commissioner's interpretation of

the law as it existed prior to the amendment prevented a taxpayer from deducting a net loss from the income of a fractional part of a year, and we think there is as much reason to regard the amendment as designed to change the law in that respect as there is for giving it the limited effect ascribed to it by the court below. Had Congress not desired the definition of "taxable year" to be generally applicable, presumably it would have so stated.

The question decided by the Court of Claims in *Beneficial Loan Society* v. *United States,* 48 F. (2d) 686, certiorari denied, 284 U.S. 633, is not analogous to the question involved here. That case had to do with prorating the specific credit allowed by Section 236 of the 1926 Act, and the definition of "taxable year" in Section 200 was not considered. We submit that the decision there has no direct bearing on the present problem.

The decision below has been followed in *Arnold Constable Corp.* v. *Commissioner,* 69 F. (2d) 788 (C.C.A. 2d), and *Joseph & Feiss Co.* v. *Commissioner,* 70 F. (2d) 804 (C.C.A. 6th), but we think those cases were erroneously decided for the reasons stated in this brief. The same question was decided in the Government's favor in *Wishnick-Tumpeer, Inc.,* v. *Commissioner* (App.D.C.), decided March 12, 1934, not yet officially reported, but found in Vol. I, Prentice-Hall, 1934, p. 975.

81809—34——2

ARGUMENT

The right of Haines Furniture Company to deduct in 1927 a loss sustained by it during the period January 1 to May 31, 1925, must be found in a specific provision of the statute or it does not exist. *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 326; *Dalton* v. *Bowers,* 287 U.S. 404, 409. The only statute to which respondents may point is Section 206 (b) of the Revenue Act of 1926 (*infra,* p. 22). That section provides:

> If, for any *taxable year,* it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding *taxable year* (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding *taxable year* (hereinafter in this section called "third year"); * * *. (Italics supplied.)

The term "taxable year" is specifically defined by Section 200 (*infra,* p. 22) as follows:

> The term "taxable year" includes, *in the case of a return made for a fractional part of a year* under the provisions of this title or *under regulations prescribed by the Com-*

> *missioner with the approval of the Secretary, the period for which such return is made.* * * * (Italics supplied.)

Article 634 of Regulations 69 (*infra*, p. 24), promulgated under this section, provides that—

> (b) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.
>
> Ordinarily in such cases, where only two corporations are involved * * * under the conditions described in (b) above, each *corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of change of stock ownership to the end of the taxable year,* including therein the income of the subsidiary or subordinate corporation for such period. (Italics supplied.)

Here the two corporations were not affiliated at the beginning of the year, but through a change of stock ownership became affiliated on June 1, 1925. They filed a consolidated return for the entire year, but later the Haines Furniture Company, in compliance with Article 634, *supra*, filed a separate

return for the period January 1 to May 31, 1925.[1] Thus the Haines Furniture Company was required to, and it did, file a separate return for the period January 1 to May 31, 1925, and the two companies filed a consolidated return for the period June 1 to December 31, 1925. Accordingly, the Haines Furniture Company's calendar year 1925 was divided into two "taxable years" under the plain provisions of Section 200.[2] *Wishnick-Tumpeer, Inc.*, v. *Commissioner, supra.* The Board of Tax Appeals therefore held that the calendar year 1926 became the "third taxable year" within the meaning of Section 206 for the purpose of applying the January 1 to May 31, 1925, net loss, and consequently that such loss could not be carried forward to the taxable year 1927.

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[1] The Board of Tax Appeals has uniformly held that the filing of such a separate return was required (*American LaDentelle, Inc.*, v. *Commissioner*, 1 B.T.A. 575; *Grand River Distilling Co.* v. *Commissioner*, 16 B.T.A. 395; *Weissberger Moving & Storage Co.* v. *Commissioner*, 26 B.T.A. 1375; *Joseph & Feiss Co.* v. *Commissioner*, 26 B.T.A. 1424, reversed, 70 F. (2d) 804 (C.C.A. 6th); *Arnold Constable Corp.* v. *Commissioner*, 26 B.T.A. 1427, reversed, 69 F. (2d) 788 (C.C.A. 2d), now pending on petition for rehearing), and such has been the view of the courts which have had occasion to consider the question (*Wishnick-Tumpeer, Inc.*, v. *Commissioner, supra; American Paper Exports* v. *Bowers*, 54 F. (2d) 508, 509 (C.C.A. 2d)).

[2] This conclusion is also fortified by the provisions of Section 226 (b), *infra*, p. 23 (made applicable to corporations by Section 239 (U.S.C. App., Title 26, Sec. 991)), and by Article 1523 of Regulations 69 (*infra*, p. 25).

The court below, however, held that the term "taxable year", as used in the first part of the sentence constituting Section 206 (b), means any period of less than twelve months for which a return is required to be made by the regulations; but that the same phrase, as used twice again in the same sentence, means a full period of twelve months only. We submit that in so holding the court clearly violated the most elementary principles of statutory construction.

It is well settled that when the same word or phrase is used in the same section of an Act more than once and the meaning is clear as used in one place, it will normally be construed to have the same meaning in the next place. *Lewellyn* v. *Harbison,* 31 F. (2d) 740, 742 (C.C.A. 3d), certiorari denied, 280 U.S. 560. See, also, *Pampanga Mills* v. *Trinidad,* 279 U.S. 211, 218; *United States* v. *Brunett,* 53 F. (2d) 219, 234 (W.D.Mo.). Compare *Atlantic Cleaners & Dyers, Inc.,* v. *United States,* 286 U.S. 427. If such rule applies where the same word or phrase is used in the same section more than once, it necessarily applies with greater force where the word or phrase is used more than once in the same sentence. In fact, it is improbable that Congress would use the identical phrase in different senses in penning a single sentence, and there is no evidence that it did here. With meticulous care it defined the meaning of the term "taxable year" as including—

> in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. * * *

Upon that definition it placed no limitation. That such definition applies to the term "taxable year" as used in the first part of the sentence constituting Section 206 (b) is conceded, and we submit that it should be construed to have the same meaning as thereafter used in the same sentence. By giving effect to the plain meaning of the language used by Congress, the statute is rendered unambiguous, and it is the duty of the courts to give effect to unambiguous statutory provisions. *Ozawa* v. *United States,* 260 U.S. 178, 194; *Commissioner of Immigration* v. *Gottlieb,* 265 U.S. 310, 313.

In attributing to the phrase "taxable year", as used for the second and third times in Section 206 (b), a different meaning from the same phrase as used in the first part of the sentence, it is clear that the court below sought to give effect to what it thought the statute should provide. This is beyond the power of a court. *Flint* v. *Stone Tracy Co.,* 220 U.S. 107, 173–174.

To support its position the court below relied upon inferences drawn from the legislative history of Section 200 (R. 26–27). While legislative history is sometimes helpful in the construction of a

doubtful statute, it is well settled that such aid to interpretation, like all others, may be resorted to only for the purpose of resolving an ambiguity, not for the purpose of creating one. *United States* v. *Shreveport Grain & El. Co.*, 287 U.S. 77, 83; *Edwards* v. *Douglas*, 269 U.S. 204, 211; *Caminetti* v. *United States*, 242 U.S. 470, 485; *In re Boggs-Rice Co.*, 66 F. (2d) 855, 858 (C.C.A. 4th). Where the language of a statute is clear, it is conclusive, and there can be no construction where there is nothing to construe. *United States* v. *Hartwell*, 6 Wall. 385, 396; *United States* v. *Shreveport Grain & El. Co., supra*, p. 83.

In the instant case the statute is as clear as it could possibly be made and we therefore submit that it does not admit of the use of extrinsic aids to interpretation. Furthermore, the intent of Congress, as gathered from the legislative history, is less clear than the statute, and it is certainly delusive to attempt to construe a statute couched in plain terms by reference to ambiguous legislative history. See *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16.

Sections 200 and 206 had their origin in Sections 200 and 204, respectively, of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Section 204 (b) of that Act provided that if "for any taxable year" a taxpayer sustained a net loss the amount thereof could be deducted from such taxpayer's net income for the preceding "taxable year" and the unab-

sorbed balance, if any, could be carried forward and used as a deduction in computing such taxpayer's net income for the succeeding "taxable year." Section 200 defined the term "taxable year" as "the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232."

The provisions of Sections 200 and 204 (b) of the Revenue Act of 1918 were reenacted in Sections 200 and 204 (b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, without change, except that net losses were allowed to be carried forward two taxable years instead of back one taxable year and forward one taxable year, as in the 1918 Act. In applying the provisions of these Acts the Commissioner of Internal Revenue took the position that a period of less than twelve months did not constitute a taxable year for any purpose having to do with net losses, and the Board of Tax Appeals sustained him in most cases, except when the fractional period was the taxpayer's first or last accounting period, immediately following organization or immediately preceding dissolution. See *Carroll Chain Co.* v. *Commissioner,* 1 B.T.A. 38, affirmed, *sub. nom. United States* v. *Carroll Chain Co.,* 8 F. (2d) 529 (S.D. Ohio); *Durabilt Steel Locker Co.* v. *Commissioner,* 5 B.T.A. 239. Thus it was held, in accordance with the Commissioner's contentions, that a net loss computed for a period of less than

twelve months was not a statutory net loss which could be deducted from income in a succeeding year. *Tacoma Grocery Co.* v. *Commissioner,* 1 B.T.A. 1062; *Dorsey Drug Co.* v. *Commissioner,* 7 B.T.A. 229; *Turners Falls Power & Electric Co.* v. *Commissioner,* 9 B.T.A. 435. And it was likewise held that a net loss sustained in one year could not be deducted from the income of a succeeding period of less than twelve months. *Arthur Walker & Co.* v. *Commissioner,* 4 B.T.A. 151;[3] *General Box Corp.* v. *Commissioner,* 22 B.T.A. 725, 728. The majority of the cases involved voluntary changes in accounting periods, with the fractional portion of the year falling between the end of the old accounting period and the beginning of the new. The same principles were, however, held applicable in cases like the instant case, where the fractional period resulted from affiliation during the course of a year. See *General Box Corp.* v. *Commissioner, supra,* p. 729.

While none of the cases cited in the preceding paragraph were decided until after the passage of the 1924 Act, all of them involved prior Revenue Acts and are illustrative of the position taken by

[3] In this case the Board said (p. 155): "The net loss provision of the 1921 Act is confined in its operation to offsetting a net loss of one year against the income of the succeeding year, and no provision is made for offsetting the loss of one year against the income of only a portion of the succeeding year."

the administrative officials under those Acts.[4] Evidently the Committee on Ways and Means of the House was advised of the difficulties that were being experienced in applying the net-loss provisions to fractional periods, for when it was considering H.R. 6715, which later became the Revenue Act of 1924, c. 234, 43 Stat. 253, it proposed an addition to Section 200 (U.S.C., Title 26, Sec. 931) as follows:

> The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.

With respect to this addition the Committee said (H.Rep. No. 179, 68th Cong., 1st Sess., p. 10):

> Section 200:
>
> (1) In subdivision (a) of this section the term "taxable year" is defined to include a

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[4] Since we are concerned only with the historical background of the amendment to the definition of "taxable year" in Section 200 of the Revenue Act of 1924, it seems unnecessary to consider in detail the court decisions under the earlier Acts. See, however, *De Haven Mfg. Co.* v. *United States*, 31 F. (2d) 999 (E.D.N.Y.); *Chess & Wymond Co.* v. *Lucas*, 33 F. (2d) 793 (W.D.Ky.); *Stimpson Computing Scale Co.* v. *Lucas*, 39 F. (2d) 473 (W.D.Ky.); *Pennsylvania Chocolate Co.* v. *Lewellyn*, 27 F. (2d) 762 (W.D.Pa.); *Sterling Oil & Gas Co. v. Lucas*, 51 F. (2d) 413 (W.D.Ky.); *Corrugated Bar Co., Inc.*, v. *Gage*, 58 F. (2d) 360 (W.D.N.Y.); *United States* v. *Hoffman*, 61 F. (2d) 294 (C.C.A. 8th); *Commissioner* v. *Riley Stoker Corp.*, 67 F. (2d) 688 (C.C.A. 1st); *Wright & Kremers, Inc.*, v. *United States*, 3 F. Supp. 616 (C.Cls.).

> period of less than a year *when a return is made for such period.* Under the existing law the use of the term "taxable year" in the "net loss" section and other sections *has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the result that the benefits of such sections are denied to taxpayers who are required by law to make a return for a fractional part of a year.* (Italics ours.)

While it thus appears that the Committee was primarily motivated by a desire to relieve taxpayers, it does not appear that such was its sole motive. Furthermore, it is to be remembered that the law as it then existed worked hardship upon taxpayers in at least two respects: not only did it deny them the privilege of treating a "net loss" computed for a period of less than twelve months as a statutory net loss (*Tacoma Grocery Co.* v. *Commissioner, supra*), but, as construed by the Commissioner and the Board of Tax Appeals, it precluded them from deducting from the income of a fractional period a net loss sustained during the preceding taxable year—a privilege which taxpayers in some instances desired (*Arthur Walker & Co.* v. *Commissioner, supra*). It is just as probable, therefore, that the Committee had in mind cases like the *Arthur Walker & Co.* case, and intended to permit taxpayers to deduct net losses from the income of fractional periods, as that it intended the amendment to apply to situations like that presented in the *Tacoma Grocery Co.* case.

Consequently, we submit, there is just as much reason for saying that Congress intended the amended definition of "taxable year" to apply to that phrase as used for the second and third times in Section 206 (b) as there is for applying it to the phrase as used for the first time in that section. Certainly Congress must have been sufficiently familiar with the provisions of Section 206 (b) to know what the effect of the proposed amendment to Section 200 would be upon the phrase "taxable year" as used three times in the later section. In the absence of some more definite showing, at least, it must be assumed that Congress was cognizant of the effect of what it was doing, and that had it not desired the amendment to apply equally to the words "taxable year" each time they appeared in the same section it would have made its position clear.

The best that can be said for the opinion of the court below is that it held that a vague and indefinite Committee report clarified a perfectly clear and unambiguous statute so as to make it mean something other than that which it plainly states. We submit that there is no justification for such judicial legislation.

The court below thought it significant that under the regulations a return for a fractional part of a year was not due to be filed until March 15th of the following year (R. 25). It is difficult to perceive wherein such a regulation could have any bearing

upon the question here involved, particularly in view of the provision of Section 226 (b) of the Revenue Act of 1926, which states:

> Where a separate return is so made, *and in all other cases where a separate return is required or permitted,* by regulations prescribed by the Commissioner with the approval of the Secretary, *to be made for a fractional part of a year,* then the income *shall be computed on the basis of the period for which separate return is made.* (Italics supplied.)

It would seem that in determining that which constitutes a *taxable year* it is far more important to ascertain *the period prescribed for tax computation* than the time for *filing a return.* Logically, the period prescribed for *tax computation* should be called a "taxable year" (see Article 1523, Regulations 69, *infra,* p. 25), while the time for filing a return has no significance whatever.

The lower court seems to have thought that the question here presented was analogous to that decided by the Court of Claims in *Beneficial Loan Society* v. *United States,* 48 F. (2d) 686, certiorari denied, 284 U.S. 633. That case had to do with the question of prorating the $2,000 specific credit allowed by Section 236 of the Revenue Act of 1926 (U.S.C.App., Title 26, Sec. 988). The definition of "taxable year" contained in Section 200 was not involved, and the court did not discuss it. Section 226 (e) expressly provided that if a return was

made for a fractional part of a year, the specific credit should be prorated, and the Court of Claims did nothing more than give effect to that statute. That case is similar to *Beneficial Loan Society* v. *Commissioner,* 70 F. (2d) 288 (App.D.C.), and we submit that neither has any direct bearing upon the instant case. Cf. *Wishnick-Tumpeer, Inc.,* v. *Commissioner, supra.*

In the latter case, the Court of Appeals of the District of Columbia had before it the identical question here presented, although arising under the Revenue Act of 1928. In supporting the views urged by the petitioner here, the court there said:

> By both statute and regulations * * * the taxable year is defined to be the period for which a return is filed, though only a fractional part of the year. The language is plain, and there is no need for resort to any other source to discover its meaning. The argument of Tumpeer would require us to reject the ordinary rule of interpretation and to say that the words used should be given no effect, because to do so would defeat the obvious purpose of Congress to permit net losses to be spread over a full three year period. This we do not feel we may properly do.

The Circuit Court of Appeals for the Second Circuit, in *Arnold, Constable Corp.* v. *Commissioner,* 69 F. (2d) 788, and the Circuit Court of Appeals for the Sixth Circuit, in *Joseph & Feiss Co.* v. *Commissioner,* 70 F. (2d) 804, have followed

the decision below. However, we believe that those decisions, like the decision in this case, clearly distort the plain provisions of the statute and are erroneous.

CONCLUSION

We submit that the decision of the court below is erroneous and should, therefore, be reversed.

Respectfully submitted.

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SEPTEMBER 1934.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926,[5] c. 27, 44 Stat. 9:

> SEC. 200. When used in this title—
>
> (*a*) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925. (U.S.C.App., Title 26, Sec. 931.)
>
> * * * * *
>
> SEC. 206. * * * (*b*) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year

[5] Effective as of Jan. 1, 1925; see Section 286 of the Revenue Act of 1926 (U.S.C.App., Title 26, Sec. 941).

(hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

(U.S.C.App., Title 26, Sec. 937.)

* * * * *

SEC. 226. * * * (*b*) Where a separate return is so made, and in all other cases where a separate return is required or permitted, by regulations prescribed by the Commissioner with the approval of the Secretary, to be made for a fractional part of a year, then the income shall be computed on the basis of the period for which separate return is made.

(U.S.C.App., Title 26, Sec. 968.)

* * * * *

SEC. 240. (*a*) Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(*b*) In any case in which a tax is assessed upon the basis of a consolidated return, the

total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.

(U.S.C. App., Title 26, Sec. 993.)

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

ART. 634. *Change in ownership during taxable year.*—(*a*) Where corporations are affiliated at the beginning of a taxable year but due to a change in stock ownership during the year the affiliated status is terminated, or (b) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.

Ordinarily in such cases, where only two corporations are involved, the parent or principal corporation, under the conditions described in (*a*) above, should file a consolidated return including the income of such subsidiary or subordinate corporation to the date of the change of stock ownership, and each should file a separate return from the date of such change in stock ownership to the end of the taxable period, and, under the conditions described in (*b*) above, each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a

consolidated return should be filed by the parent or principal corporation from the date of change of stock ownership to the end of the taxable year, including therein the income of the subsidiary or subordinate corporation for such period.

* * * * *

Where, in accordance with the procedure set forth above, a return is made by a corporation for a period less than a year, the tax shall be computed in accordance with sections 226 and 239 and the articles thereunder. Where corporations become affiliated during the taxable year the separate returns of the corporations for the portion of the taxable year during which they were not affiliated will not be due until the fifteenth day of the third month following the close of the taxable year. * * *

ART. 1523. *"Taxable year", "withholding agent", "paid or incurred", and "paid or accrued."*—The taxable year is the time unit for the purpose of the tax. The term includes, in the case of a return made for a fractional part of a year under these regulations, the period for which the return is made. (See section 212 and article 22.) * * *

U. S. GOVERNMENT PRINTING OFFICE : 1934

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APR 1
CHARLES ELMO

In the

Supreme Court of the United States.

October Term, 1933.

No. [redacted] 12

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,

v.

Morgan's, Incorporated, et al.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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INDEX.

	Page
Question presented	1
Statement of facts	2
Statutes and regulations involved	3
Reasons for denying the writ	3
Appendix A	9
Material portions of statutes and regulations involved	9
Revenue Act of 1926, c. 27, 44 Stat. 9	9
Treasury Regulations 69, promulgated under the Revenue Act of 1926	10
Revenue Act of 1928, c. 852, 45 Stat. 795	14
Regulations 74, promulgated under the Revenue Act of 1928	17
Regulations 75, relating to consolidated returns of affiliated corporations prescribed under section 141 (b) of the Revenue Act of 1928	18
Appendix B	18
Decision of Circuit Court of Appeals for the Second Circuit in Arnold Constable Corporation v. Commissioner of Internal Revenue	18

AUTHORITIES CITED.

Arnold Constable Corporation v. Commissioner of Internal Revenue, decided March 12, 1934 (printed at p. 18, hereof)	3, 8
Joseph & Feiss Co. v. Commissioner (pending in C.C.A. 6th)	3
Weissberger Moving & Storage Co., Inc., v. Commissioner, 26 B.T.A. 1375	8
Wishnick-Tumpeer, Inc., v. Commissioner, decided March 12, 1934	3, 4, 5, 7

	Page
Regulations 69, arts. 431, 625, 651	6
Regulations 69, art. 634	6
Regulations 74, art. 371	5
Regulations 75, art. 14	4
Regulations 75, art. 41 (d)	5, 6
Revenue Act of 1924	7
Revenue Act of 1926, sec. 200 (a)	5, 7
Revenue Act of 1926, sec. 206	2
Revenue Act of 1926, sec. 240 (a)	6
Revenue Act of 1926, sec. 240 (b)	3
Revenue Act of 1928, sec. 47 (a) (b) and (c)	4, 5
Revenue Act of 1928, sec. 117 (b)	5
Revenue Act of 1928, sec. 141 (a), (b)	5

In the

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 904.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

MORGAN'S, INCORPORATED, ET AL.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, seeks a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on December 15, 1933 (R. 33-40). This opinion is reported in 68 F. (2d) 325.

QUESTION PRESENTED.

Where two pre-existing corporations, each keeping its accounts and making its income tax returns for calendar years, become affiliated during a calendar year, and thereafter a consolidated return is filed, including the income of the parent for the whole calendar year and of the subsidiary from the date of affiliation to the end of the calendar

year, and the subsidiary files a separate return for the portion of the calendar year from January 1 to the date of affiliation, has that subsidiary during that calendar year filed returns for two taxable years or one taxable year for the purpose of applying the net loss provisions of section 206 of the Revenue Act of 1926?

Statement of Facts.

Morgan's, Incorporated, the parent, on June 1, 1925, acquired the entire capital stock of Haines Furniture Company, the subsidiary, and the two companies, both Massachusetts corporations maintaining books on a calendar year basis, were affiliated from then to the end of 1927. (The two corporations are still affiliated.)

Haines Furniture Company filed a separate return for the period January 1, 1925, to May 31, 1925, disclosing its net loss of $59,239.56; its net loss for the balance of the calendar year 1925 of $61,626.69 was included in the consolidated corporation income tax return filed by Haines Furniture Company and Morgan's, Incorporated, for the calendar year 1925. For 1926 the net loss of $2551.76 of Haines Furniture Company was included in the consolidated corporation income tax return filed by Haines Furniture Company and Morgan's, Incorporated. In the consolidated corporation income tax return filed by the same companies for the calendar year 1927, the income of Haines Furniture Company of $63,188.34 was reduced by the net loss sustained by that company for the period January 1, 1925, to May 31, 1925, of $59,239.56. The Commissioner refused to allow this deduction and assessed a deficiency against each company. No part of the net loss sustained by Haines Furniture Company for the fractional part of the year 1925 prior to affiliation with Morgan's, Incorporated, had been allowed in computing the consolidated net income for the

taxable period June 1, 1925, to December 31, 1925, or for the calendar years 1926 and 1927. The deficiency assessed against each petitioner for the year 1927 represents the allocation to each of the deficiency claimed to be due on the basis of net income properly assignable to each corporation as provided in the Revenue Act of 1926, section 240 (b).

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in Appendix A, pages 9 to 18.

Reasons for Denying the Writ.

1. The decision below is in accord with the decision in *Arnold Constable Corporation* v. *Commissioner of Internal Revenue,* decided by the Circuit Court of Appeals for the Second Circuit on March 12, 1934. The opinion in that case is not yet reported, but a copy is printed as Appendix B (pages 18 to 23). There is also pending in the Circuit Court of Appeals for the Sixth Circuit the case of *Joseph & Feiss Co.* v. *Commissioner,* in which the issue is the same as in the present case. We are informed that the Government has suggested that the Circuit Court might deem it advisable to delay its decision in that case until after the action of the Court upon this writ.

Other than these cases, we know of no case pending in any circuit involving the issue in this case.

The decision in this case is not in conflict with the decision of the Court of Appeals of the District of Columbia in *Wishnick-Tumpeer, Inc.,* v. *Commissioner,* decided March 12, 1934.

This case may be readily distinguished from the case of *Wishnick-Tumpeer, Inc.*

In the case of *Wishnick-Tumpeer, Inc.*, the parent and subsidiary corporations had different accounting periods. The taxable year of the subsidiary ended October 31 and of the parent December 31.

The question involved in the *Wishnick-Tumpeer* case was a question involved in a return for the year 1929 to which Regulations 75 applied. Article 14 of Regulations 75 reads as follows:

> "Accounting period of an affiliated group.—The taxable year of the parent corporation shall be considered as the taxable year of an affiliated group which makes a consolidated return, and the consolidated net income must be computed on the basis of the taxable year of the parent corporation."

On January 1, 1929, the parent asked for and received permission to change its accounting period from the calendar year to a fiscal year ending June 30. The parent had filed a separate return for the calendar year 1928, and the subsidiary had filed a separate return for its fiscal year ending October 31, 1928. When the parent changed its taxable year from the calendar year to a fiscal year ending June 30, the parent's taxable year 1929 became, under section 47 (a) of the Revenue Act of 1928, the period from January 1 to June 30, 1929.

When, therefore, a consolidated return was filed by the parent and subsidiary for 1929, the subsidiary automatically changed from one fiscal year to another; and the period consisting of November and December, 1928, was after one taxable year of the subsidiary ended, and before the next taxable year of the parent, and consequently of the subsidiary, began. When this happened the period consisting of November and December, 1928, was squeezed out as a separate accounting period, and, under the provisions of

sections 47 (a), (b) and (c) of the Revenue Act of 1928, must be treated as a separate accounting and taxable period for which a separate return had to be filed "for a fractional part of a year." (See also Regulations 74, article 371.)

Such a period was within the express words of section 117 (b) of the Revenue Act of 1928 defining the words "taxable year." The sentence relevant (which is also included under section 200 (a) of the Revenue Act of 1926) reads as follows:

> "The term 'taxable year' includes, in the case of a return made *for a fractional part of the year* under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made." (Italics supplied.)

Furthermore, under the provisions of article 41 (d) of Regulations 75, the return for the period November and December, 1928, was for a "taxable year." Section 41 (d) reads as follows:

> "Taxable year.—Any period of less than twelve months for which either a separate return or a consolidated return is filed, under the provisions of article 13, shall be considered as a taxable year."

By sections 141 (a) and (b) of the Revenue Act of 1928, each corporation in the affiliated group making the consolidated return consents to the regulations made by the Commissioner and the Commissioner is given the power to make regulations relative to the filing of consolidated returns.

It would seem, therefore, that in the *Wishnick-Tumpeer* case the return of the subsidiary for the period consisting of November and December, 1928, is a return for a taxable year; first, because the regulations of the Commissioner so

say, and secondly, because it is a return for a separate accounting period that is squeezed out when a taxpayer changes its taxable year.

The situation is entirely different in the present case. Section 240 (a) of the Revenue Act of 1926 provides that affiliated corporations may make consolidated returns under regulations prescribed by the Commissioner with the approval of the Secretary.

The Commissioner then prescribed by Regulations 69, article 634. Under these Regulations he did not prescribe that a return made for the first portion of the taxable year of a subsidiary prior to affiliation should be a return for a taxable year as he did in article 41 (d) of Regulations 75, or in fact that the return for such period should be a return "for a fractional part of a year" in the sense that the last-quoted phrase is used in the Statute and Regulations. As appears from articles 431, 625 and 651 of Regulations 69, a return "for a fractional part of a year" refers to a return for a separate accounting period where that accounting period is less than twelve months. But in the situation presented in the present case there was no change of accounting period. Both parent and subsidiary always used the calendar year as their respective accounting periods. In such a situation article 634 of Regulations 69 evidently does not regard the separate return which it requires a subsidiary to file (in this case the Haines Furniture Company for the period January 1 to May 31, 1925) as a return "for a fractional part of a year," and hence for "a taxable year." The regulation expressly states that this is a return "for that part of the taxable year" and "for the portion of the taxable year during which they were not affiliated"; and, contrary to returns "for a fractional part of a year," this return is not due "until the fifteenth day of the third month following the close of the taxable year." This separate return is expressly a return for a portion of a taxable year.

We do not see how it can be said with any consistency, therefore, to be a return for a whole taxable year or "for a fractional part of a year," which is said by the Statute to be a taxable year. In the *Wishnick-Tumpeer* case, on the other hand, the separate return for November and December, 1928, is by law a return for a separate accounting period and "for a fractional part of a year." It comes, therefore, within the express words of the Statute. It also comes within the express words of the Regulations applicable in 1929 defining the taxable year.

But under the Statute and Regulations applicable to the case at bar there is nothing which expressly requires the separate return filed by Haines Furniture Company for the period from January 1 to May 31, 1925, to be considered as a return for a whole taxable year.

2. The decision below is correct.

Unless the express words of the Statute require, and permit of no other construction, there is no reason why the Haines Furniture Company should be entitled to use past losses for one year and seven months only as deductions from income, when other corporations may use losses for two years, especially when the only purpose of the sentence in section 200 (a) of the Revenue Act of 1926, quoted on page 5 of this brief, was to broaden the scope of the deduction rather than to restrict it.

When this sentence was first being considered in connection with the Revenue Act of 1924, the Ways and Means Committee made the following statement referring to this sentence:

> "In subdivision (a) of this Section the term 'taxable year' is defined to include a period of less than a year when a return is made for such period. Under the existing law the use of the term 'taxable year' in the

'net loss' section and other sections has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the result that the benefits of such sections are denied the taxpayers who are required by law to make a return for a fractional part of a year."

This was brought out clearly by the dissenting opinion of Member Van Fossan, in the case of *Weissberger Moving & Storage Company, Inc.*, v. *Commissioner*, 26 B.T.A. 1375, 1377; and in the decision in the case of *Arnold Constable Corporation* v. *Commissioner of Internal Revenue*, Appendix B, pages 21 and 22.

Wherefore it is respectfully submitted that the petition should be denied.

April, 1934.

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Appendix A.

Material Portions of Statutes and Regulations Involved.

Revenue Act of 1926, C. 27, 44 Stat. 9.

Section 200.

(a) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925. (26 U.S.C.A. section 931 (a).)

Section 206.

(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary. (26 U.S.C.A. section 937 (b).)

Section 240.

(a) Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner. (26 U.S.C.A. section 993 (a).)

Section 240.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236. (26 U.S.C.A. section 993 (b).)

TREASURY REGULATIONS 69, PROMULGATED UNDER THE REVENUE ACT OF 1926.

Article 431.

Returns for periods of less than 12 months. No return can be made for a period of more than 12 months. A separate return for a fractional part of a year is therefore required wherever there is a change, with the approval of the Commissioner, in the basis of computing net income from one taxable year to another taxable year. The periods

to be covered by such separate returns in the several cases are stated in the statute. The requirements with respect to the filing of a separate return and the payment of tax for a part of a year are the same as for the filing of a return and the payment of tax for a full taxable year closing at the same time. (See sections 227 and 270 and articles 441-447 and 1201.) The tax on net income computed on the basis of the period for which a separate return is made shall be paid thereon at the rate for the calendar year in which such period is included. In case of a change in the accounting period the net income computed on the return for the fractional part of a year shall be placed on an annual basis and the tax computed as provided in section 226 (c). See further section 212 and articles 25 and 26, and as to corporations, sections 232 and 239 and articles 531 and 625.

Since it is not required that income be placed on an annual basis except where the taxpayer voluntarily changes his accounting period, the income of a decedent or of his estate for the fractional parts of the year in which he died need not be placed on an annual basis.

Article 625.

Returns for fractional part of year. If a corporation, with the approval of the Commissioner, changes its accounting period from calendar year to fiscal year, from fiscal year to calendar year, or from one fiscal year to another fiscal year, a separate return shall be made for a fractional part of a year and the net income on such return shall be placed on an annual basis as provided in section 226 (c). (See article 431.) In all other cases the credit of $2,000 against net income allowed a domestic corporation having a net income not exceeding $25,000 shall be reduced to such proportion of the full credit as the number of months in the period for which the return is made bears to 12 months.

Article 634.

Change in ownership during taxable year. (a) Where corporations are affiliated at the beginning of a taxable year but due to a change in stock ownership during the year the affiliated status is terminated, or (b) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.

Ordinarily in such cases, where only two corporations are involved, the parent or principal corporation, under the conditions described in (a) above, should file a consolidated return including the income of such subsidiary or subordinate corporation to the date of the change of stock ownership, and each should file a separate return from the date of such change in stock ownership to the end of the taxable period, and, under the conditions described in (b) above, each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of change of stock ownership to the end of the taxable year, including therein the income of the subsidiary or subordinate corporation for such period.

Where there are more than two corporations affiliated at the beginning of the taxable year, and due to a change in stock ownership the affiliated status of one or more is terminated, but there remain at least two corporations affiliated during the entire year, the parent or principal corporation should file a consolidated return for the entire year, excluding from its return the income of the corporations whose affiliated status is terminated from the date of the change in stock ownership; or where two or more corporations are affiliated at the beginning of the taxable year,

and through change in stock ownership additional corporations become affiliated, the parent or principal corporation should file a consolidated return and include the income of such corporations from the date of change of stock ownership. In either case, the subsidiary or subordinate corporation whose status is changed during the taxable year should make a separate return for that part of the taxable year during which it was outside of the affiliated group.

Where, in accordance with the procedure set forth above, a return is made by a corporation for a period less than a year, the tax shall be computed in accordance with sections 226 and 239 and the articles thereunder. Where corporations become affiliated during the taxable year the separate returns of the corporations for the portion of the taxable year during which they were not affiliated will not be due until the fifteenth day of the third month following the close of the taxable year. For example, if two corporations become affiliated on July 1, 1926, and elect to file a consolidated return for the period from July 1 to December 31, 1926, the separate returns of the corporations covering the period from January 1 to June 30, 1926, will be due on March 15, 1927. In any case in which the change of affiliated status is for a period so short as to be negligible, a consolidated return or separate returns for the entire period, as the case may be, may be filed; in such cases, however, there should accompany the return a complete statement setting forth the changes in the affiliated status occurring during the taxable year.

Article 651.

Time and place for filing returns. Returns of income must be made on or before the fifteenth day of the third month following the close of the fiscal or calendar year, as provided in section 227 and articles 441-447. In the case of foreign corporations not having any office or place of business in the

United States, however, returns shall be made on or before the fifteenth day of the sixth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, on or before June 15. A corporation going into liquidation during any taxable year may upon the completion of such liquidation prepare a return covering its income for the fractional part of the year during which it was engaged in business and may immediately file such return with the collector. A corporation having an office or agency in the United States must make its return to the collector of the district in which is located its principal office or agency. Other corporations must make their returns to the collector at Baltimore.

REVENUE ACT OF 1928, C. 852, 45 STAT. 795.

Section 47.

(a) *Returns for Short Period Resulting from Change of Accounting Period.* If a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December 31. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. (26 U.S.C.A. section 2047 (a).)

Section 47.

(b) *Income Computed on Basis of Short Period.* Where a separate return is made under subsection (a) on account

of a change in the accounting period, and in all other cases where a separate return is required or permitted, by regulations prescribed by the Commissioner with the approval of the Secretary, to be made for a fractional part of a year, then the income shall be computed on the basis of the period for which separate return is made. (26 U.S.C.A. section 2047 (b).)

Section 47.

(c) *Income Placed on Annual Basis.* If a separate return is made under subsection (a) on account of a change in the accounting period, the net income, computed on the basis of the period for which separate return is made, shall be placed on an annual basis by multiplying the amount thereof by twelve and dividing by the number of months included in the period for which the separate return is made. The tax shall be such part of the tax computed on such annual basis as the number of months in such period is of twelve months. (26 U.S.C.A. section 2047 (c).)

Section 117.

(b) *Net Loss as a Deduction.* If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary. (26 U.S.C.A. section 2117 (b).)

Section 141.

(a) *Privilege to File Consolidated Returns.* An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for the taxable year 1929 or any subsequent taxable year, in lieu of separate returns. The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to all the regulations under subsection (b) prescribed prior to the making of such return; and the making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group. (26 U.S.C.A. section 2141 (a).)

Section 141.

(b) *Regulations.* The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability. (26 U.S.C.A. section 2141 (b).)

REGULATIONS 74, PROMULGATED UNDER THE REVENUE ACT OF 1928.

Article 371.

Returns for periods of less than 12 months. No return can be made for a period of more than 12 months. A separate return for a fractional part of a year is therefore required wherever there is a change, with the approval of the Commissioner, in the basis of computing net income from one taxable year to another taxable year. The periods to be covered by such separate returns in the several cases are stated in the Act. The requirements with respect to the filing of a separate return and the payment of tax for a part of a year are the same as for the filing of a return and the payment of tax for a full taxable year closing at the same time. (See sections 53 and 56 and articles 401-404, 431 and 746.) The tax on net income computed on the basis of the period for which a separate return is made shall be paid thereon at the rate for the calendar year in which such period is included. Where a return is made for a fractional part of a year, except where a return is made for a period of less than 12 months by reason of a change in accounting period, the personal exemption and credit for dependents, and the credit of $3000 allowed a domestic corporation having a net income not exceeding $25,000, shall be reduced to that proportion of the full credit which the number of months in the period for which the return is made bears to 12 months.

In case of a change in accounting period the net income computed on the return for the fractional part of a year shall be placed on an annual basis and the tax computed as provided in section 47 (c). Where the net income of a corporation is placed on an annual basis, the amount of the net income after being placed on such basis determines whether the credit of $3000 is allowable.

REGULATIONS 75

RELATING TO CONSOLIDATED RETURNS OF AFFILIATED CORPORATIONS PRESCRIBED UNDER SECTION 141 (B) OF THE REVENUE ACT OF 1928.

(Applicable to the taxable year 1929 and subsequent taxable years.)

Section 41.

(d) *Taxable Year.* Any period of less than 12 months for which either a separate return or a consolidated return is filed, under the provisions of article 13, shall be considered as a taxable year.

APPENDIX B.

CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

(Decided March 12, 1934.)

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges.

AUGUSTUS N. HAND, Circuit Judge: This petition for review involves a deficiency of $36,584.54 in the income taxes of Arnold Constable Corporation, a Delaware company. The taxes in controversy are for the fiscal year of that company from February 1, 1927, to January 31, 1928. The deficiency resulted from the holding of the Commissioner that no part of the loss suffered in the fiscal year ended January

31, 1926, by petitioner's affiliate Arnold Constable & Co., Inc., could be allowed in computing consolidated net income for the year ended January 31, 1928. We think that the assessment of a deficiency by the Commissioner was erroneous and the order of the Board of Tax Appeals affirming it should be reversed.

For the fiscal years ended January 31, 1925, and January 31, 1926, Arnold Constable & Co., Inc., sustained net losses of $308,216.45 and $342,461.23, respectively. For the period February 1, 1926, to May 6, 1926, inclusive, it had a net income of $70,730.56, and for that period filed a separate return. On May 7, 1926, approximately 98% of its capital stock was acquired by the petitioner Arnold Constable Corporation, the parent of an affiliated group, and in the consolidated return of the affiliated group the net income of Arnold Constable & Co., Inc., for the period May 7, 1926, to January 31, 1927, was included. During this last period Arnold Constable & Co., Inc., had a net income of $185,677.85. For the fiscal year ended January 31, 1928, petitioner filed a consolidated return showing a net income to Arnold Constable & Co., Inc., of $618,646.68, and claimed an offset to such income of a portion of the net loss sustained by such company during the fiscal year ended January 31, 1926. The Commissioner disallowed the offset and determined a deficiency accordingly. The Board of Tax Appeals affirmed the ruling of the Commissioner and held that the period February 1 to May 6, 1926, for which Arnold Constable & Co., Inc., had filed a separate return and the period May 7, 1926, to January 31, 1927, for which its income was included in the consolidated return constituted two taxable years and that, therefore, the net loss could not be carried past the second taxable year ended January 31, 1927.

The taxpayer contends that the fiscal years from February 1, 1926, to and including January 31, 1927, and from February 1, 1927, to and including January 31, 1928, were each taxable years within the meaning of the applicable provisions of the Revenue Acts of 1926 and 1928, so that the net losses of Arnold Constable & Co., Inc., for both the fiscal years which ended January 31, 1925, and January 31, 1926, should be carried forward and allowed as deductions from the net income for the year ended January 31, 1927 and the net income for the year ended January 31, 1928. The right to do this depends upon the proper interpretation of Section 206 (a) and (b) and Section 226 (b) and Section 240 (a) of the Revenue Act of 1926, taken in connection with Section 200 (a) thereof and corresponding provisions of the Revenue Act of 1928.

Section 200 (a) provides that:

> The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925.

Section 206 (b) provides:

> If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that

any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

It is argued that the words in Section 200 (a): "The term 'taxable year' includes, in the case of a return made for a fractional part of a year * * * the period for which such return is made," are a definition of a taxable year for all purposes. But the words first appeared in Section 200 (a) of the Act of 1924, and were inserted in the corresponding sections of the Acts of 1918 and 1921 to broaden relief which had before that time been allowed to taxpayers.

Under the earlier Revenue Acts the Commissioner of Internal Revenue had ruled that a taxpayer that had been required to make a return for an accounting period of less than twelve months could not carry forward losses sustained in such fractional period and deduct them from a subsequent full year's income or carry forward losses from a full year's income and deduct them from a subsequent fractional period. While the 1924 Act was under consideration A. W. Gregg, Special Assistant to the Secretary of the Treasury, explained to the Ways and Means Committee the situation as it then existed as follows:

In subdivision (a) of this section the term "taxable year" is defined to include a period of less than a year

> when a return is made for such period. Under the existing law the use of the term "taxable year" in the "net loss" section and other sections has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the result that the benefits of such sections are denied the taxpayers who are required by law to make a return for a fractional part of a year.

The revised definition of "taxable year" inserted in Section 200 (a) by the 1924 Act was particularly intended to cover cases where a corporation had begun business within a regular taxable year or had discontinued business, or changed its accounting period before the end of its taxable year. Any interpretation of Section 200 (a) which would make a report for a fractional part of a year prior to affiliation a taxable year for the purpose of deducting net losses under Section 206 (b) deprives corporations affiliating at times other than the beginning of a full taxable year of the right to carry forward net losses over two periods of twelve months each. Should there be affiliations with a number of corporations at different dates in the same year (a not unusual case) the taxpayer might essentially lose the right to deduct the prior year's loss from profits accruing during a period of more than a few days. Such a result is certainly repugnant to the purpose of the statute modeled in general on the English Act and intended in a measure to stabilize income taxes for periods of three full years.

The Supreme Court has construed the income tax acts as in general establishing an accounting period of twelve months. *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, 363; *Woolford Realty Co. v. Rose*, 286 U. S. 319, 328. The Circuit Court of Appeals of the First Circuit held in *Morgan's, Inc., v. Commissioner of Internal Revenue*, 68 Fed. (2) 325, that a fractional part of the year 1925 for which a corpora-

tion made a separate return was not a "taxable year" in any sense which prevented the corporation when making a consolidated return with an affiliate for the balance of the year 1925 from deducting losses realized in the first part of 1925 from its 1927 income. The Court of Claims expressed a similar view in *Beneficial Loan Society of Bethlehem v. United States*, 48 Fed. (2d) 686, 687. The affiliated taxpayers did not become a single taxable unit but only a single tax computing unit. *Woolford Realty Co. v. Rose, supra.* The return by Arnold Constable & Co., Inc., for a fractional part of the year 1926 was not, in our opinion, a return for a taxable year within the meaning of Section 206 (b) of the Act of 1926, or Section 117 (e) of the Act of 1928, and the losses of Arnold Constable & Co., Inc., sustained for the fiscal years ended January 31, 1925 and January 31, 1926, might be carried forward for the two fiscal years of twelve months each that succeeded the year of such loss. If this had been done there would have been no deficiency in the income tax of the petitioner for the fiscal year ended January 31, 1928.

The order of the Board of Tax Appeals is reversed.

FILE COPY

OCT 3 1
CHARLES ELMORE

In the

Supreme Court of the United States.

October Term, 1934.

No. 12.

Guy T. Helvering, Commissioner of Internal Revenue,

Petitioner,

v.

Morgan's, Incorporated, et al.

RESPONDENTS' BRIEF.

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INDEX.

	Page
Concise statement of the case	1
Statutes and regulations involved	2
Summary of argument	2
Argument	4
I. The respondents' contention is supported by the authorities	4
II. The respondents' contention is supported upon principle, because—	
A. By a literal construction of section 200 (a) of the Revenue Act of 1926, the whole calendar year 1925 was the only taxable year of the Haines Furniture Company in that year, instead of that company's having two taxable years in that year as contended by the Commissioner	9
B. Under the spirit of the Revenue Act of 1926 and the intent of Congress, the taxable year of the Haines Furniture Company during the year 1925, when it became affiliated, was the whole calendar year 1925, and the Haines Furniture Company is entitled to carry its net loss for the whole calendar year forward over the two succeeding taxable years	18
Conclusion	24
Appendix A	25
Material portions of Statutes and regulations involved	25
Revenue Act of 1926, c. 27, 44 Stat. 9	25
Section 200	25
Section 206	25
Section 240 (a) (b)	26

Page

Treasury Regulations 69, promulgated under the Revenue Act of 1926 26
Article 431 26
Article 625 27
Article 634 28
Article 651 29
Revenue Act of 1928, c. 852, 45 Stat. 795 30
Section 47 (a) (b) 30
Section 47 (c) 31
Section 117 (b) 31
Section 141 (a) (b) 32
Regulations 74, promulgated under the Revenue Act of 1928 33
Article 371 33
Regulations 75 34
Section 41 34
Appendix B 34
Decision in Crossett Western Company v. Commissioner of Internal Revenue 34

TABLE OF CASES CITED.

Arnold Constable Corporation v. Commissioner of Internal Revenue, 69 F. (2d) 788 4, 16, 22
Beneficial Loan Society v. United States, 48 F. (2d) 686 (certiorari denied, 284 U.S. 634) 8, 11
Commissioner v. Ginsberg, 54 F. (2d) 238 11
[illegible] Commissioner (decided August 28, 1934) 4
Helvering v. New York Trust Company, 78 L. ed. 860 22
Joseph & Feiss v. Commissioner, 70 F. (2d) 804 4
Sweets Company of America, Inc., v. Commissioner, 40 F. (2d) 436 11

Page

United States v. Hoffman, 61 F. (2d) 294 11

Wishnick-Tumpeer, Inc., v. Commissioner (unreported), 1 Prentice Hall, 1934, 975 4

Woolford Realty Co., Inc., v. Rose, 286 U.S. 319 11, 12

In the
Supreme Court of the United States.

October Term, 1934.

No. 12.

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*,

v.

MORGAN'S, INCORPORATED, et al.

RESPONDENTS' BRIEF.

Concise Statement of the Case.

Morgan's, Incorporated, the parent, on June 1, 1925, acquired the entire capital stock of Haines Furniture Company, the subsidiary, and the two companies, both Massachusetts corporations maintaining books on a calendar year basis, were affiliated from then to the end of 1927. (The two corporations are still affiliated.)

Haines Furniture Company filed a separate return for the period January 1, 1925, to May 31, 1925, disclosing its net loss of $59,239.56; its net loss for the balance of the calendar year 1925 of $61,626.69 was included in the consolidated corporation income tax return filed by Haines

Furniture Company and Morgan's, Incorporated, for the calendar year 1925. For 1926 the net loss of $2551.76 of Haines Furniture Company was included in the consolidated corporation income tax return filed by Haines Furniture Company and Morgan's, Incorporated. In the consolidated corporation income tax return filed by the same companies for the calendar year 1927, the income of Haines Furniture Company of $63,188.34 was reduced by the net loss sustained by that company for the period January 1, 1925, to May 31, 1925, of $59,239.56. The Commissioner refused to allow this deduction and assessed a deficiency against each company. No part of the net loss sustained by Haines Furniture Company for the part of the year 1925 prior to affiliation with Morgan's, Incorporated, had been allowed in computing the consolidated net income for the taxable period June 1, 1925, to December 31, 1925, or for the calendar years 1926 and 1927. The deficiency assessed against each petitioner for the year 1927 represents the allocation to each of the deficiency claimed to be due on the basis of net income properly assignable to each corporation as provided in the Revenue Act of 1926, section 240 (b).

Statutes and Regulations Involved.

The Statutes and regulations involved are set forth in Appendix A, pages 25 to 34.

Summary of Argument.

The question involved in this case may be briefly stated as follows:

Where two pre-existing corporations, each keeping its accounts and making its income tax returns for calendar years, become affiliated during a calendar year, and there-

after a consolidated return is filed, including the income of the parent for the whole calendar year and of the subsidiary from the date of affiliation to the end of the calendar year, and the subsidiary files a separate return for the portion of the calendar year from January 1 to the date of affiliation, has that subsidiary during that calendar year filed returns for two taxable years or one taxable year for the purpose of applying the net loss provisions of section 206 of the Revenue Act of 1926?

The precise question in this case is whether the Haines Furniture Company can carry forward against its income for the calendar year 1927 its net loss for the whole calendar year 1925 or is limited to carrying forward its net loss for that portion of the year 1925 after affiliation. The respondents contend that the net loss for the whole calendar year 1925 can be carried forward.

The respondents will argue as follows:

I. The respondents' contention is supported by the authorities.

II. The respondents' contention is supported upon principle, because—

A. By a literal construction of section 200 (a) of the Revenue Act of 1926, the whole calendar year 1925 was the only taxable year of the Haines Furniture Company in that year, instead of that company's having two taxable years in that year as contended by the Commissioner.

B. Under the spirit of the Revenue Act of 1926 and the intent of Congress, the taxable year of the Haines Furniture Company during the year 1925, when it became affiliated, was the whole calendar year 1925, and the Haines Furniture Company is entitled to carry its net loss for the whole calendar year forward over the two succeeding taxable years.

Argument.

I. The respondents' contention is supported by the authorities.

The question presented in this case has arisen and been decided in four circuits, and, in each one of these, favorably to the contention of the respondents. The case in the First Circuit is the present case (Record, p. 23). The case in the Second Circuit is *Arnold Constable Corporation* v. *Commissioner of Internal Revenue,* 69 F. (2d) 788. The case in the Third Circuit is *Crossett Western Company* v. *Commissioner,* decided August 28, 1934, and quoted in full in Appendix B of this brief, beginning on page 34. The case in the Sixth Circuit is *Joseph & Feiss* v. *Commissioner,* 70 F. (2d) 804.

There has been one case decided which the Commissioner contends supports his contentions in this case: *Wishnick-Tumpeer, Inc.,* v. *Commissioner,* decided by the Court of Appeals of the District of Columbia, not yet officially reported, but to be found in vol. 1, Prentice Hall, 1934, page 975. This case may be readily distinguished from the present case and the foregoing cases decided in the Second, Third and Sixth Circuits, which support the respondents' contention in this case.

In the case of Wishnick-Tumpeer, Inc., the parent and subsidiary corporations had different accounting periods. The taxable year of the subsidiary ended October 31 and of the parent December 31.

The question in the Wishnick-Tumpeer case was one involving 1929 taxes, to which the Revenue Act of 1928 and Regulations 75 applied. Article 14 of Regulations 75 reads as follows:

> "Accounting period of an affiliated group.—The taxable year of the parent corporation shall be considered as the taxable year of an affiliated group which makes a

consolidated return, and the consolidated net income must be computed on the basis of the taxable year of the parent corporation."

On January 1, 1929, the parent asked for and received permission to change its accounting period from the calendar year to a fiscal year ending June 30. The parent had filed a separate return for the calendar year 1928, and the subsidiary had filed a separate return for its fiscal year ending October 31, 1928. When the parent changed its taxable year from the calendar year to a fiscal year ending June 30, the parent's taxable year 1929 became, under section 47 (a) of the Revenue Act of 1928, the period from January 1 to June 30, 1929.

When, therefore, a consolidated return was filed by the parent and subsidiary for 1929, the subsidiary automatically changed from one fiscal year to another; and the period consisting of November and December, 1928, was after one taxable year of the subsidiary ended and before the next taxable year of the parent, and consequently of the subsidiary, began. When this happened, the period consisting of November and December, 1928, was squeezed out as a separate accounting period, and, under the provisions of sections 47 (a), (b) and (c) of the Revenue Act of 1928, must be treated as a separate accounting and taxable period for which a separate return had to be filed "for a fractional part of a year." (See also Regulations 74, article 371.)

Such a period was within the express words of section 117 (b) of the Revenue Act of 1928 defining the words "taxable year." The sentence relevant (which is also included under section 200 (a) of the Revenue Act of 1926) reads as follows:

"The term 'taxable year' includes, in the case of a return made *for a fractional part of the year* under the

provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made." (Italics ours.)

Furthermore, under the provisions of article 41 (d) of Regulations 75, the return for the period November and December, 1928, was for a "taxable year." Section 41 (d) reads as follows:

> "Taxable year.—Any period of less than twelve months for which either a separate return or a consolidated return is filed, under the provisions of article 13, shall be considered as a taxable year."

By sections 141 (a) and (b) of the Revenue Act of 1928, each corporation in the affiliated group making the consolidated return consents to the regulations made by the Commissioner and the Commissioner is given the power to make regulations relative to the filing of consolidated returns.

It would seem, therefore, that in the Wishnick-Tumpeer case the return of the subsidiary for the period consisting of November and December, 1928, is a return for a taxable year, first, because the regulations of the Commissioner so state, and secondly, because it is a return for a separate accounting period that is squeezed out when a taxpayer changes its taxable year.

The situation is entirely different in the present case. Section 240 (a) of the Revenue Act of 1926 provides that affiliated corporations may make consolidated returns under regulations prescribed by the Commissioner with the approval of the Secretary.

The Commissioner then prescribed by Regulations 69, article 634. Under these regulations he did not prescribe that a return made for the first portion of the taxable year of a subsidiary prior to affiliation should be a return for a

taxable year, as he did in article 41 (d) of Regulations 75, or in fact that the return for such period should be a return "for a fractional part of a year" in the sense that the last-quoted phrase is used in the Statute and regulations. As appears from articles 431, 625 and 651 of Regulations 69, a return "for a fractional part of a year" refers to a return for a separate accounting period where that accounting period is less than twelve months. But in the situation presented in the present case there was no change of accounting period. Both parent and subsidiary always used the calendar year as their respective accounting periods. In such a situation article 634 of Regulations 69 evidently does not regard the separate return which it requires a subsidiary to file (in this case the Haines Furniture Company for the period January 1 to May 31, 1925) as a return "for a fractional part of a year," and hence for "a taxable year." The regulation expressly states that this is a return "for that part of the taxable year" and "for the portion of the taxable year during which they were not affiliated"; and, contrary to returns "for a fractional part of a year," this return is not due "until the fifteenth day of the third month following the close of the taxable year." This separate return is expressly a return for a *portion* of a *taxable year*. Similarly, the consolidated return filed includes the income of the subsidiary "to the end of the taxable year." We do not see how it can be said with any consistency, therefore, that either return is for a whole taxable year of the subsidiary, or "for a fractional part of a year," which is said by the Statute to be a taxable year. In the Wishnick-Tumpeer case, on the other hand, the separate return for November and December, 1928, is by law a return for a separate accounting period and "for a fractional part of a year." It comes, therefore, within the express words of the Statute. It also comes within the express words of the regulations applicable in 1929 defining the taxable year.

Beneficial Loan Society v. *United States,* 48 F. (2d) 686, specifically considers the definition of the words "taxable year" as used in section 200 (a) of the Revenue Act of 1926 and supports the respondents' contentions in the present case. In that case the taxpayer had been affiliated until May 1, 1925. Its income for the period from February 1, 1925, to April 30, 1925, was included in the consolidated return. It made a separate return for the period from May 1, 1925, to January 31, 1926, and contended that said return was for a "taxable year." The Court in overruling the contention said (page 687):

> ". . . But this contention is not true. The plaintiff was in existence for its entire fiscal year of twelve months ending January 31, 1926, and previous thereto. Until May 1, 1925 plaintiff was affiliated with another corporation and the consolidated return was the return of the plaintiff until affiliation ceased, and this is true whether the consolidated return was filed by or in the name of another corporation as the parent company. It was the return of the plaintiff as much as if it had been a separate return. Each member of the affiliated group at all times retained its separate identity and was a separate taxpayer under the statute . . . Under Section 226 (b) of the Revenue Act of 1926, in Article 634 of Regs. 65 and 69, plaintiff was required to make and file a separate return for the period May 1, 1925, the date of the termination of the affiliation, to the end of its taxable year, January 31, 1926. . . . *The separate return filed by plaintiff for the period May 1, 1925 to January 31, 1926, was not a return for a 'taxable year' any more than was the consolidated return for three months of the plaintiff's fiscal year a return by it for a taxable year. Under the facts there was merely a change in the basis of reporting net income which re-*

quired the plaintiff to file a return for a fractional part of a year.'' (Italics ours.)

The taxpayer's petition for certiorari in the Beneficial Loan case was denied (284 U.S. 633).

II. The respondents' contention is supported upon principle, because—

A. By a literal construction of section 200 (a) of the Revenue Act of 1926, the whole calendar year 1925 was the only taxable year of the Haines Furniture Company in that year, instead of that company's having two taxable years in that year as contended by the Commissioner.

The contention of the Commissioner is based upon the definition of the term ''taxable year'' in section 200 (a) of the Revenue Act of 1926 and especially in the third sentence, which reads as follows:

> ''The term 'taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.''

That sentence has an interesting legislative history. It first appeared in the Revenue Act of 1924. The reason for its appearance is contained in the majority report of the Ways and Means Committee on the Revenue Act of 1924, quoted in the opinion of the Court below (Record, page 26). That quotation reads as follows:

> ''In subdivision (a) of this section the term 'taxable year' is defined to include a period of less than a year when a return is made for such period. Under the exist-

> ing law the use of the term 'taxable year' in the 'net loss' section and other sections has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the result that the benefits of such sections are denied to taxpayers who are required by law to make a return for a fractional part of a year."

This was thus a relief measure and should be liberally construed in favor of the taxpayer. To construe it the way the Commissioner contends would be to deny a right the taxpayer otherwise had; and would give the taxpayer the right to carry forward losses for a period of one year and seven months rather than for the two years which the Statute contemplates.

Therefore, the first question is to determine whether the Statute and the regulations, even if they are construed literally, require that unjust result. If they do not, obviously it should not be reached.

As we have said, but for the affiliation it is perfectly clear that the Haines Furniture Company could have used its whole loss for the year 1925 as a deduction from 1927 income. Let us see how affiliation has changed the situation.

The Statute relating to consolidated returns is section 240 (a) of the Revenue Act of 1926, appearing in Appendix A, page 26. This Statute does not direct how consolidated returns should be made, but leaves that problem to the regulations.

Under article 634 of Regulations 69 (Appendix A, page 28) the Haines Furniture Company was required as a subsidiary in the affiliated group to file "a separate return for that part of the taxable year" prior to affiliation and to include its income for the balance of the taxable year in the income of a consolidated return filed by the whole group.

This simply means, as the Circuit Court of Appeals in the Second Circuit said in *Commissioner* v. *Ginsberg*, 54 F. (2d) 238:

> "Even though both corporations were affiliated in 1927, they each remained taxpayers, and their affiliation merely made them a tax-computing unit. . . . It is not a taxable unit."

This language of the Circuit Court of Appeals was approved by the Supreme Court in *Woolford Realty Co., Inc.*, v. *Rose*, 286 U.S. 319, where the Court decided that each member of a consolidated group retains its identity as a taxpayer. The accounting period of each separate taxpayer is not changed by such affiliation. Accordingly, the accounting period of the Haines Furniture Company was still the calendar year. Therefore the return filed by the Haines Furniture Company for the period January 1 to May 31, 1925, was not a return for a complete accounting period except when combined with the income which was included in the consolidated return for the balance of the year.

Furthermore, the taxable year was not ended by the affiliation, but still remains the calendar year. This was so held in *United States* v. *Hoffman*, 61 F. (2d) 294; *Sweets Company of America, Inc.*, v. *Commissioner*, 40 F. (2d) 436; *Beneficial Loan Soc.* v. *United States*, 48 F. (2d) 686 (certiorari denied, 284 U.S. 634). Regulations 69, promulgated August 28, 1926, after the Revenue Act of 1926 became law, specifically recognized that the taxable year of a subsidiary does not end upon affiliation. These regulations do not provide (see article 634, Appendix A, page 28) that the subsidiary must make a separate return for a taxable year or for a fractional part of a year, but a "separate return for *that part of the taxable year* during which it was outside the affiliated group"; and further provide for a consolidated

return "from the date of change of stock ownership *to the end of the taxable year.*"

Thus the only effect of the regulations upon the returns of affiliated corporations is that two separate returns must be made for each subsidiary during the accounting period or taxable year. The regulations correctly assume the accounting period and the taxable year to be the same twelve months they were prior to affiliation.

We maintain, accordingly, that neither of these separate returns alone is for a "taxable year" as the words are used in the Statute; but that both of these separate returns together constitute one complete return for a taxable year, split up, however, for the convenience of the Commissioner, into two physical parts. We further contend that neither of these separate returns is a return for a "fractional part of a year" as those words are used in the Statute.

We start with the proposition laid down by the Supreme Court in *Woolford Realty Co., Inc.*, v. *Rose*, 286 U.S. 319, 326:

> "The general principle underlying the income tax statutes ever since the adoption of the 16th Amendment has been the computation of gains and losses on the basis of an annual accounting for the transactions of the year."

We therefore want to avoid any deviation from the annual where we can. The idea of two separate accountings for the same accounting period is to be avoided. An accounting period is to be twelve months wherever possible. The phrase "return for a fractional part of a year," we accordingly contend, applies merely to a case where, by necessity, an accounting period is less than twelve months and a return is made for a complete accounting period. Such cases are numerous.

For example, where a man dies during a year, naturally his accounting period is less than twelve months. Similarly, where a corporation is liquidated during a year or where there is a change from a fiscal year to a calendar year or *vice versa,* an extra accounting period of less than a year necessarily emerges. Such situations are covered by Regulations 69, articles 431 (Appendix A, page 26), 625 (Appendix A, page 27) and 651 (Appendix A, page 29), promulgated under sections 226 and 239 of the Revenue Act of 1926.

It is interesting to note that the return filed in each one of these cases is for an accounting period of less than twelve months and is everywhere referred to in the Statute and regulations as a return for a "fractional part of a year," in those words. We again call attention to articles 431, 625 and 651 of Regulations 69.

But when we come to the case of consolidated returns for two or more affiliated corporations, the situation is wholly different. The Statute does not direct how such returns are to be made, but leaves that problem to the regulations. Accordingly, the Statute does not call such returns "returns for a fractional part of a year."

When we examine the language of article 634 of Regulations 69 (Appendix A, page 28), we find also that the regulations do not refer to the two separate returns that they require to be filed by the subsidiary as "returns for a fractional part of a year." The regulations might have provided in case of affiliation in these words: "A separate return shall be filed by each subsidiary for the fractional part of the year prior to affiliation."

Instead, however, we find express words in an entirely different vein. The regulations expressly say "the subsidiary or subordinate corporation, whose status is changed *during the taxable year* should make a separate return for that *part of the taxable year* during which it was outside the affiliated group." (Italics ours.)

That return is, by express words, not a return for a taxable year, but only for a part of one. A return for a part of the taxable year cannot be a return for a taxable year. Hence the period for which that return is made is not a taxable year, but only a portion of one.

Now let us complete that taxable year. That is provided for in the preceding paragraph of article 634:

> ". . . a consolidated return should be filed from the date of change of stock ownership to the *end of the taxable year*, including therein the income of the subsidiary or subordinate corporation for such period." (Italics ours.)

Thus the rest of the taxable year is dealt with. The regulations do not purport to create two taxable years where one existed before and do not purport to call for separate returns for separate accounting periods. If the words "return for a fractional part of a year" are to be given the meaning that we think is to be applied to them, article 634 does not call for returns for fractional parts of a year. On the contrary, that article merely states that the return for one taxable year shall be split into two physical parts for the convenience of the Commissioner.

The contention of the Commissioner that this method devised by the Commissioner for his convenience, without in fact changing the accounting period or taxable year of the taxpayer, makes two taxable years grow where only one grew before, especially where the Commissioner himself considers that there is only one taxable year, seems without any basis. The words "part of a taxable year," "portion of a taxable year," and "to the end of the taxable year," used by the Commissioner, indicate clearly that the taxable year of a subsidiary is not changed by affiliation, in spite of the fact that two returns are required to be filed.

That such was the intent of the regulations is brought out clearly by the following two sentences from article 634 of Regulations 69:

> "Where corporations become affiliated during the taxable year the separate returns of the corporations for the portion of the taxable year during which they were not affiliated will not be due until the fifteenth day of the third month following the close of the taxable year. For example, if two corporations become affiliated on July 1, 1926, and elect to file a consolidated return for the period from July 1 to December 31, 1926, the separate returns of the corporations covering the period from January 1 to June 30, 1926, will be due on March 15, 1927."

If each of these separate returns were for a taxable year, then the return of the Haines Furniture Company for the period from January 1 to May 31, 1925, should have been filed on September 15, 1925, instead of on March 15, 1926, under the following provisions of section 227 (a) of the Revenue Act of 1926:

> "Returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March."

The situation may be summarized briefly. Section 200 (a) says that the term "taxable year" shall "include," in the case of returns made for a fractional part of a year under regulations prescribed by the Commissioner, the period for which the return is made. Section 240 (a) says that affiliated corporations may make consolidated returns under

regulations prescribed by the Commissioner. The regulations prescribed by the Commissioner state that a subsidiary corporation shall make two separate returns during "the taxable year" within which it is affiliated. If the Statute says that a fractional part of a year is a taxable year, then a part of a taxable year cannot be "a fractional part of a year" in the sense the quoted words are used in the Statute. The two things are wholly inconsistent. The intention of the Commissioner in promulgating the regulations is clearly not to require two separate returns for fractional parts of a year but to require what he expressly says; namely, a division of a return for a whole taxable year into two physical parts.

And there is reason for the procedure adopted by the Commissioner. Look at the last sentence of section 200 (a). This provides "the first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925." If, as was stated in the case of *Arnold Constable Corporation* v. *Commissioner of Internal Revenue,* 69 F. (2d) 788, the Commissioner's contention should be adopted and there should be affiliations with a number of corporations at different dates within the same year (a not unusual case), there might be countless taxable years in the calendar year ending in 1925, whereas the Statute seems to contemplate but one.

Accordingly, and in view of the fact (1) that the principle underlying our income tax statutes is that of a tax on income based on annual accountings rather than on two accountings in the same year, (2) that the accounting period of the Haines Furniture Company has not been changed by affiliation, but has remained constant as the calendar year, (3) that the taxable year of the Haines Furniture Company does not end upon affiliation but continues to the end of the calendar year, and (4) that the regulations intend and expressly provide, not that the Haines Furniture

Company shall file two separate returns for two separate accounting periods in 1925, but that it shall file a return for the whole accounting period or taxable year in two physical parts and do not provide that its taxable year shall be split into two taxable years, we must logically come to the conclusion that, even under the literal words of the Statute, the only "taxable year" of the Haines Furniture Company in the calendar year 1925 was the whole calendar year.

To reach this result we can proceed upon either one of two bases:

The first is that the words "a return made for a fractional part of a year" do not include all returns filed which include income for a period of less than twelve months, but only include returns filed for accounting periods of less than twelve months. This is certainly a reasonable definition of the words and clearly within the intent of the Commissioner as expressed by his regulations and within the intent of Congress as shown by the Statute.

The second basis is that the third sentence of section 200 (a) does not apply to our case, for a slightly different reason. That sentence says that the taxable year "includes" certain periods shorter than twelve months. It does not say that the taxable year "shall be" each period less than twelve months for which a return is filed. When a taxpayer, such as the Haines Furniture Company in this case, already has a perfectly clear and definite accounting period and taxable year of twelve months, there is no necessity for invoking the definition of taxable year contained in that third sentence, because the taxable year already "means the calendar year" as provided in the first sentence of section 200 (a). That is, the third sentence was designed only to deal with situations not covered by the two preceding sentences; and the situation of the Haines Furniture Company was covered by the first sentence of the section.

II. B. Under the spirit of the Revenue Act of 1926 and the intent of Congress, the taxable year of the Haines Furniture Company during the year 1925, when it became affiliated, was the whole calendar year 1925, and the Haines Furniture Company is entitled to carry its net loss for the whole calendar year forward over the two succeeding taxable years.

Even if we suppose that the words "return made for a fractional part of a year" might possibly be construed to include the separate returns required by the regulations to be filed by a subsidiary corporation during the taxable year of its affiliation, it is clear that such construction was not the intent of Congress.

As was said by the Court below, section 200 (a) should be construed to conform with the general scheme of the income tax acts as to accounting periods and the purpose of Congress in allowing net losses to be spread forward over a two-year period.

We do not think we can improve upon the reasoning of the Court below and its statement with respect to this feature of the case. On pages 26, 27 and 28 of the record the Court below said:

> "The provisions allowing a spread of net loss in one year to be deducted from the net income of the two succeeding years, first appeared in the act of 1921, sec. 204 (b), though a provision was inserted in the 1918 act, sec. 204 (b), permitting net losses for any year be- 1, 1920, to be deducted from the net income of the next prior year.
>
> "The purpose of both acts, it has been recognized by the courts and by the Board of Tax Appeals, was to provide a relief for taxpayers who might suffer severe losses in the year immediately following the close of

the war in 1918, to deduct their losses from the war profits of 1918, and to allow losses of any one year during the period of readjustment of business after the war to be spread over a period of three years, in case there was not income earned during either of the two succeeding years after the loss occurred. Sec. 200 of the 1924 and 1926 acts should be so construed as to allow the relief granted by sec. 204 (b) and 206 (b) of these acts, and not to curtail it.

"The Supreme Court has construed the Income Tax Acts since 1913 as, in general, defining the accounting period as a period of twelve months. Burnet v. Sanford & Brooks Co., 282 U.S. 359, 363, in which the court said:

" 'All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt.' Also see Woolford Realty Co., Inc., v. Rose, 286 U.S. 319, 326.

"Why, then, did Congress add the further definition of a taxable year as including a shorter period and was it intended to affect the provisions of sec. 204 (b)?

"The majority of the Ways and Means Committee on the Revenue Act of 1924, H.R. 6715, when this added definition first appears, referring to sec. 200, says:

"In subdivision (a) of this section the term 'taxable year' is defined to include a period of less than a year when a return is made for such period. Under the existing law the use of the term 'taxable year' in the 'net loss' section and other sections has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the result that the

benefits of such sections are denied to taxpayers who are required by law to make a return for a fractional part of a year.' Similar language was contained in the report of the Senate Committee on Finance.

"The Commissioner of Internal Revenue had, prior to the enactment of the 1924 act, construed secs. 200 and 204 (b) of the 1921 act strictly, and held that a taxpayer beginning business or going out of business during a fiscal or calendar year, or in case of a change in the accounting period during a taxable year from a fiscal to a calendar year, or vice versa, was not entitled to the relief provided in sec. 204 (b), and had refused to allow as a deduction in a succeeding year net losses incurred in any fractional part of a year for which the taxpayer was required to file a return, because a fractional part of a year was not a taxable year within the meaning of secs. 200 and 204 (b) of that act. Appeal of Carroll Chain Co., 1 B.T.A. 38; Appeal of Patapsco Ballast Co., 1 B.T.A. 1081; Appeal of Joe Siegal, Inc., 1 B.T.A. 1113; Appeal of Tacoma Grocery Co., 1 B.T.A. 1061, in which cases there were appeals from his decisions.

"It is clear, we think, that Congress, as was indicated in the report of its committees, added the further definition of a taxable year to sec. 200 in order that a taxpayer required to make a return for a fractional part of a year, which by reason of a change in its accounting period was not a part, either of its prior or new annual accounting period, should clearly have the benefit of sec. 204 (b) as to losses suffered during that fractional period, a right which the Commissioner in his construction of sec. 200 of the 1921 act had previously denied him.

"The added definition of a taxable year was in furtherance of the relief granted in sec. 204 (b) of the

1921 act, and was not intended as a curtailment thereof by shortening the period over which net losses might be spread, and to repudiate the strict construction of sec. 200 and 204 (b) previously enforced by the Commissioner.

"Sec. 200 of the 1924 and 1926 acts, therefore, should not be construed, as has been done in this case, to deprive a corporation, which has hitherto been doing business and making its return on a calendar year, and which suffered a loss during the calendar year 1925, of the right to spread that loss over the two succeeding years, because, in accordance with Treasury Regulations 69, art. 634, it made a separate return of its income during the period from January 1 to May 31, 1925, having on May 31 become affiliated with another corporation and joined in a consolidated return for the period from June 1 to December 31, 1925, in which return only its loss suffered during the latter period was absorbed.

"Affiliated taxpayers do not become a single taxable unit, but merely a single tax-computing unit. Woolford Realty Co. Inc. v. Rose, supra; Commissioner v. Ginsberg, 54 Fed. (2d) 238; United States v. Hoffman et al., 61 Fed. (2d) 294; Sweets Company of America, Inc. v. Commissioner, 40 Fed. (2d) 436. The Haines Company, therefore, retained its status as a separate 'taxable unit' for the entire calendar year 1925. Its net losses and net income were determined by its business for the full calendar year. After affiliation its ness for the full calendar year. After affiliation its proportionate net loss absorbed in the affiliating return was, or should have been, determined in accordance with art. 634 of the regulations 65, and sec. 240 of the 1924 act.

"A liberal construction of sec. 200 as amended in 1924 requires that so much of the net losses of the

> Haines Company during 1925 as were not absorbed in the consolidated return, should be deducted from its net income in 1927, under sec. 204 (b) of the 1924 act, and sec. 206 (b) of the 1926 act. The fact that it became a part of another tax-computing unit on June 1, 1925, did not change its status as a taxable unit for that year. It was still a 'taxable unit' for the full calendar year of 1925, which constituted its taxable year. Beneficial Loan Soc. of Bethlehem v. United States, 48 Fed. (2d) 686. (Certiorari denied 284 U.S. 633.) For an able discussion of the proper construction of sec. 200, also see the dissenting opinion of Member Van Fossan in the case of Weissberger Moving & Storage Company, Inc. v. Commissioner, 26 B.T.A. 1375, 1377."

This seems to us to be a clear and logical exposition to which we have to add only the following observations:

The Circuit Court in the case of *Arnold Constable Corporation* v. *Commissioner of Internal Revenue*, 69 F. (2d) 788, 790, tested the Commissioner's contention by an extreme example and stated the result as follows:

> ". . . Should there be affiliations with a number of corporations at different dates in the same year (a not unusual case) the taxpayer might essentially lose the right to deduct the prior year's loss from profits accruing during a period of more than a few days. Such a result is certainly repugnant to the purpose of the statute modeled in general on the English Act and intended in a measure to stabilize income taxes for periods of three full years."

We believe that the result achieved by the Court below is perfectly warranted by principles of statutory construction. In *Helvering* v. *New York Trust Company*, 78 L. ed. 960, 963, this Court said:

"The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. Commr. of Immigration v. Gottlieb, 265 U.S. 310, 313. Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 37. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in Brown v. Duchesne, 19 How. 183, this court said (p. 194): 'It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' Quite recently in Ozawa v. United States, 260 U.S. 178, we said (p. 194): 'It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design, and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.' And in Barrett v. Van Pelt, 268 U.S. 85, 90, we applied the rule laid down in The People v. Utica Ins. Co., 15 Johns. 358, 381, that 'a thing which is within the intention of the makers of a statute is as much within the statute as if it were

within the letter; and a thing which is within the letter of a statute, is not within the statute, unless it be within the intention of the makers.' "

And on page 965 this Court further said:

"Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law. In view of the inclusion of the same definition in the Acts of 1921, 1924 and 1926 and the legislative purpose underlying it, the contention that the new words were added to change the meaning of 'capital assets' as defined in the earlier Acts is without force. The definition so clarified was not new law but 'a more explicit expression of the purpose of the prior law.' Jordan v. Roche, 228 U.S. 436, 445. Merle-Smith v. Commissioner, 42 F. (2d) 837, 842. McCauley v. Commissioner, 44 F. (2d) 919, 920."

Conclusion.

We submit that a literal construction of the Statute establishes the contention of the respondents; that under the spirit of the tax law and the intent of Congress no other contention is justifiable; and that the overwhelming weight of authority supports that contention. The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Appendix A.

Material Portions of Statutes and Regulations Involved.

Revenue Act of 1926, C. 27, 44 Stat. 9.

Section 200.

(a) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925. (26 U.S.C.A. section 931 (a).)

Section 206.

(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary. (26 U.S.C.A. section 937 (b).)

Section 240.

(a) Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner. (26 U.S.C.A. section 993 (a).)

Section 240.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236. (26 U.S.C.A. section 993 (b).)

TREASURY REGULATIONS 69, PROMULGATED UNDER THE REVENUE ACT OF 1926.

Article 431.

Returns for periods of less than 12 months. No return can be made for a period of more than 12 months. A separate return for a fractional part of a year is therefore required wherever there is a change, with the approval of the Commissioner, in the basis of computing net income from one taxable year to another taxable year. The periods

to be covered by such separate returns in the several cases are stated in the statute. The requirements with respect to the filing of a separate return and the payment of tax for a part of a year are the same as for the filing of a return and the payment of tax for a full taxable year closing at the same time. (See sections 227 and 270 and articles 441-447 and 1201.) The tax in net income computed on the basis of the period for which a separate return is made shall be paid thereon at the rate for the calendar year in which such period is included. In case of a change in the accounting period the net income computed on the return for the fractional part of a year shall be placed on an annual basis and the tax computed as provided in section 226 (c). See further section 212 and articles 25 and 26, and as to corporations, sections 232 and 239 and articles 531 and 625.

Since it is not required that income be placed on an annual basis except where the taxpayer voluntarily changes his accounting period, the income of a decedent or of his estate for the fractional parts of the year in which he died need not be placed on an annual basis.

Article 625.

Returns for fractional part of year. If a corporation, with the approval of the Commissioner, changes its accounting period from calendar year to fiscal year, from fiscal year to calendar year, or from one fiscal year to another fiscal year, a separate return shall be made for a fractional part of a year and the net income on such return shall be placed on an annual basis as provided in section 226 (c). (See article 431.) In all other cases the credit of $2,000 against net income allowed a domestic corporation having a net income not exceeding $25,000 shall be reduced to such proportion of the full credit as the number of months in the period for which the return is made bears to 12 months.

Article 634.

Change in ownership during taxable year. (a) Where corporations are affiliated at the beginning of a taxable year but due to a change in stock ownership during the year the affiliated status is terminated, or (b) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.

Ordinarily in such cases, where only two corporations are involved, the parent or principal corporation, under the conditions described in (a) above, should file a consolidated return including the income of such subsidiary or subordinate corporation to the date of the change of stock ownership, and each should file a separate return from the date of such change in stock ownership to the end of the taxable period, and, under the conditions described in (b) above, each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of change of stock ownership to the end of the taxable year, including therein the income of the subsidiary or subordinate corporation for such period.

Where there are more than two corporations affiliated at the beginning of the taxable year, and due to a change in stock ownership the affiliated status of one or more is terminated, but there remain at least two corporations affiliated during the entire year, the parent or principal corporation should file a consolidated return for the entire year, excluding from its return the income of the corporations whose affiliated status is terminated from the date of the change in stock ownership; or where two or more corporations are affiliated at the beginning of the taxable year,

and through change in stock ownership additional corporations become affiliated, the parent or principal corporation should file a consolidated return and include the income of such corporations from the date of change of stock ownership. In either case, the subsidiary or subordinate corporation whose status is changed during the taxable year should make a separate return for that part of the taxable year during which it was outside of the affiliated group.

Where, in accordance with the procedure set forth above, a return is made by a corporation for a period less than a year, the tax shall be computed in accordance with sections 226 and 239 and the articles thereunder. Where corporations become affiliated during the taxable year the separate returns of the corporations for the portion of the taxable year during which they were not affiliated will not be due until the fifteenth day of the third month following the close of the taxable year. For example, if two corporations become affiliated on July 1, 1926, and elect to file a consolidated return for the period from July 1 to December 31, 1926, the separate returns of the corporations covering the period from January 1, to June 30, 1926, will be due on March 15, 1927. In any case in which the change of affiliated status is for a period so short as to be negligible, a consolidated return or separate returns for the entire period, as the case may be, may be filed; in such cases, however, there should accompany the return a complete statement setting forth the changes in the affiliated status occurring during the taxable year.

Article 651.

Time and place for filing returns. Returns of income must be made on or before the fifteenth day of the third month following the close of the fiscal or calendar year, as provided in section 227 and articles 441-447. In the case of foreign corporations not having any office or place of business in the

United States, however, returns shall be made on or before the fifteenth day of the sixth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, on or before June 15. A corporation going into liquidation during any taxable year may upon the completion of such liquidation prepare a return covering its income for the fractional part of the year during which it was engaged in business and may immediately file such return with the collector. A corporation having an office or agency in the United States must make its return to the collector of the district in which is located its principal office or agency. Other corporations must make their returns to the collector at Baltimore.

REVENUE ACT OF 1928, C. 852, 45 STAT. 795.

Section 47.

(a) *Returns for Short Period Resulting from Change of Accounting Period.* If a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December 31. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. (26 U.S.C.A. section 2047 (a).)

Section 47.

(b) *Income Computed on Basis of Short Period.* Where a separate return is made under subsection (a) on account

of a change in the accounting period, and in all other cases where a separate return is required or permitted, by regulations prescribed by the Commissioner with the approval of the Secretary, to be made for a fractional part of a year, then the income shall be computed on the basis of the period for which separate return is made. (26 U.S.C.A. section 2047 (b).)

Section 47.

(c) *Income Placed on Annual Basis.* If a separate return is made under subsection (a) on account of a change in the accounting period, the net income, computed on the basis of the period for which separate return is made, shall be placed on an annual basis by multiplying the amount thereof by twelve and dividing by the number of months included in the period for which the separate return is made. The tax shall be such part of the tax computed on such annual basis as the number of months in such period is of twelve months. (26 U.S.C.A. section 2047 (c).)

Section 117.

(b) *Net Loss as a Deduction.* If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary. (26 U.S.C.A. section 2117 (b).)

Section 141.

(a) *Privilege to File Consolidated Returns.* An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for the taxable year 1929 or any subsequent taxable year, in lieu of separate returns. The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to all the regulations under subsection (b) prescribed prior to the making of such return; and the making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group. (26 U.S.C.A. section 2141 (a).)

Section 141.

(b) *Regulations.* The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability. (26 U.S.C.A. section 2141 (b).)

REGULATIONS 74, PROMULGATED UNDER THE REVENUE ACT OF 1928.

Article 371.

Returns for periods of less than 12 months. No return can be made for a period of more than 12 months. A separate return for a fractional part of a year is therefore required wherever there is a change, with the approval of the Commissioner, in the basis of computing net income from one taxable year to another taxable year. The periods to be covered by such separate returns in the several cases are stated in the Act. The requirements with respect to the filing of a separate return and the payment of tax for a part of a year are the same as for the filing of a return and the payment of tax for a full taxable year closing at the same time. (See sections 53 and 56 and articles 401-404, 431 and 746.) The tax on net income computed on the basis of the period for which a separate return is made shall be paid thereon at the rate for the calendar year in which such period is included. Where a return is made for a fractional part of a year, except where a return is made for a period of less than 12 months by reason of a change in accounting period, the personal exemption and credit for dependents, and the credit of $3000 allowed a domestic corporation having a net income not exceeding $25,000, shall be reduced to that proportion of the full credit which the number of months in the period for which the return is made bears to 12 months.

In case of a change in accounting period the net income computed on the return for the fractional part of a year shall be placed on an annual basis and the tax computed as provided in section 47 (c). Where the net income of a corporation is placed on an annual basis, the amount of the net income after being placed on such basis determines whether the credit of $3000 is allowable.

REGULATIONS 75

RELATING TO CONSOLIDATED RETURNS OF AFFILIATED CORPORATIONS PRESCRIBED UNDER SECTION 141 (B) OF THE REVENUE ACT OF 1928.

(Applicable to the taxable year 1929 and subsequent taxable years.)

Section 41.

(d) *Taxable Year.* Any period of less than 12 months for which either a separate return or a consolidated return is filed, under the provisions of article 13, shall be considered as a taxable year.

APPENDIX B.

CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

CROSSETT WESTERN COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

(Decided August 28, 1934.)

Before Woolley, Davis and Thompson, Circuit Judges.

DAVIS, Circuit Judge. This petition involves the liability of the Crossett Western Company, the petitioner, for deficiencies assessed by the Commissioner in income taxes for the years 1924 and 1929. The Board of Tax Appeals approved the deficiency assessments. 27 B. T. A. 258.

From 1924 to 1930, the petitioner carried on extensive operations in lumber and allied businesses in the States of Oregon and Washington. Another corporation, the Gates

Creek Logging Company, hereinafter called the Gates Company, was engaged in logging timberlands in Oregon. The Gates Company was managed, and was considered, as a unit of the petitioner. The meetings of the stockholders and directors of the two companies were held together; the management of the companies was the same; supplies were purchased at wholesale prices which were prorated; employees and equipment were interchanged frequently. In January, 1924, a uniform cost accounting and bookkeeping system was installed for the petitioner and the Gates Company.

At the end of 1924, members of several families, the Crossett, Watzek and Gates, were the dominating influence in the two companies. Six members of the Crossett family owned approximately 57 per centum of the petitioner's stock, 10 members of the Watzek family owned 27 per centum, 8 members of the Gates family owned 11 per centum, and 3 of the employees owned 3 per centum; the petitioner owned approximately 73 per centum of the stock of the Gates Company, 2 members of the Crossett family owned 2 per centum, 5 members of the Watzek family owned 4 per centum, and 1 member of the Gates family owned 2 per centum, and 8 of the employees owned 17 per centum. The employees who owned stock took no part in the management of the companies and their stock was voted by proxy.

The holdings of the Gates Company stock changed so that in 1925, the petitioner owned approximately 80 per centum and 9 of its stockholders owned 17 per centum; and in 1926, the petitioner owned approximately 83 per centum and 8 of its stockholders owned 14 per centum.

On November 15, 1928, the petitioner had acquired 97.966 per centum of the Gates Company stock.

The Gates Company was operated with losses during the period from 1924 to 1929. For those years the petitioner and the Gates Company filed consolidated income tax re-

turns on the ground that they were affiliated and also requested the Commissioner to consolidate the accounts of the two companies. The Commissioner determined that the companies became affiliated first on November 15, 1928, and were not entitled to file consolidated returns until that time, and that the period from January 1, 1928, to the date of affiliation was one "taxable year" and the period from November 15, 1928 to the end of the year another "taxable year" for which a separate return must be filed under section 48 of the Revenue Act of 1928; and finally that the petitioner was not entitled to consolidate the accounts of the companies in 1924 under section 240 (d) of the Revenue Act of 1924.

The petitioner and the Gates Company were not affiliated prior to November 15, 1928, under section 240 (c) of the Revenue Act of 1924 and 1926 and section 142 (c) of the Act of 1928. These sections in the various acts are identical and provide that:

> For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns at least 95 per centum of the voting stock of the other or others, or (2) if at least 95 per centum of the voting stock of two or more corporations is owned by the same interests.

They require for affiliation that one corporation own at least 95 per centum of the voting stock of the other, or that the same interests shall own not only 95 per centum of the voting stock of the other but, shall own in substantially the *same proportions* at least 95 per centum of the stock of the two companies. This is clear from our decision in *Commissioner* v. *Samuel Bell and Sons,* 67 Fed. (2d) 175, and from the decision of the Supreme Court in *Handy and Harmon* v. *Burnet,* 284 U. S. 136, 140.

Likewise, the Commissioner was not required to consolidate the accounts of the two companies at the request of the petitioner. Section 240 (d) of the Act of 1924 permits the Commissioner to do so "if necessary in order to make an accurate distribution or apportionment of gains, profits, income, deductions or capital between or among" related businesses owned or controlled directly or indirectly by the same interests. The Commissioner determined that consolidation of the accounts was not necessary and we are unable to say from the general nature of the facts found in the record that his determination was arbitrary.

As to the third question involved in this case, whether or not the filing of two returns in 1928 constituted two taxable years and precludes allowance in 1929 of deductions for losses suffered in previous years, we think the construction of the Commissioner and the Board of Tax Appeals of sections 48 and 117 of the Revenue Act of 1928, and of Article 733 of Treasury Regulations 74, is untenable.

Article 733 provides that where corporations are not affiliated at the beginning of the taxable year, but through change of stock ownership (as in the instant case) during the year become affiliated "each corporation should make a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be made by the corporation from the date of the change of stock ownership to the end of the taxable year, including therein the income of both corporations for such period."

Under that provision both corporations had to make separate returns for 1928 from January 1, 1928 to November 15, 1928 and a consolidated return from and including November 16, 1928 to December 31, 1928.

Section 117 (b) of the Act of 1928 provides:

> Net loss as a deduction.—if, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year",) and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year") the deduction in all cases to be made under the regulations prescribed by the Commissioner with the approval of the Secretary.

The losses suffered by the two corporations in 1927 should have been allowed under this section unless the two returns filed for 1928 constituted two "taxable years" and we do not think they did.

Section 48 (a) of the Act provides:

> "Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1928, shall be the calendar year 1928 or any fiscal year ending during the calendar year 1928.

The "taxable year" in question was the "calendar year" for 1928 and the calendar year "includes" the fractional part of the "taxable year" for which the return was made, but the "fractional part" is not the whole taxable year; it is simply included in the "taxable year."

To hold the petitioner to the government's abstraction would work an unusual hardship which is not the object of legislation unless specifically pointed out. The doubt cast upon the government's construction is sufficient in itself to resolve the question in favor of the petitioner. *Gould* v. *Gould*, 245 U. S. 151. The losses sustained in previous years should have been allowed in 1929.

The order of redetermination of the Board of Tax Appeals is modified, in accordance with this opinion.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 12.—October Term, 1934.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Morgans, Incorporated, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This petition for certiorari, 292 U. S. 618, presents for determination the single question, whether the two separate periods in 1925, for which the taxpayer made separate income tax returns, constitute two "taxable years" within the meaning of § 206 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 17, which permits the taxpayer suffering a net loss in any taxable year to deduct it from taxable gains in the two succeeding taxable years.

On June 1, 1925 respondent, Morgans, Incorporated, acquired all the voting stock of respondent Haines Furniture Company. Later, and in due course, in compliance with § 240 (a) and Article 634 of Treasury Regulations 69, the Haines Company filed its separate income tax return for the first five months of 1925 preceding the affiliation, and the two affiliated corporations filed a consolidated return for the last seven months of the year and for the calendar years 1926 and 1927. During the seven months' period of 1925, and in 1926 and 1927, Morgans, Incorporated reported net income. In the first five and the last seven months of 1925, and in 1926, the Haines Company suffered net losses. In 1927 it made a net profit. Its net loss in the first five months of 1925, before affiliation, was shown in its separate return for that period. Its net losses for the last seven months of 1925 and for the year 1926 were shown in the consolidated returns of the two corporations for those periods and were deducted from the net income of Morgans, Incorporated, in the returns for each of these periods. In the consolidated return for 1927, the Haines Company brought forward its loss for the first five months of 1925 and deducted it from its net income for 1927, under the provi-

sions of § 206 (b). The Commissioner disallowed this deduction, and determined a corresponding deficiency for the taxable year 1927. The order of the Board of Tax Appeals sustaining his action, — B. T. A. —, was set aside by the Court of Appeals for the first circuit. 68 F. (2d) 325. Like rulings have been made by the Courts of Appeals in other circuits. *Arnold Constable Corporation* v. *Commissioner of Internal Revenue,* 69 F. (2d) 788 (C. C. A. 2d); *Crossett Western Company* v. *Commissioner,* — F. (2d) — (C. C. A. 3rd); *Joseph & Feiss Co.* v. *Commissioner,* 70 F. (2d) 804 (C. C. A. 6th). A different conclusion was reached in *Wishnich-Tumpeer, Inc.* v. *Commissioner,* decided March 12, 1934, by the Court of Appeals of the District of Columbia, under the Revenue Act of 1928, applied in circumstances and under regulations not involved in the present case.

Section 206(b) permits the taxpayer to carry forward a net loss sustained "for any taxable year" and to deduct it from "net income of the taxpayer for the [redacted] succeeding taxable year." If the net loss to be deducted is in excess of the net income for that year, he is permitted to deduct the excess "from the net income of the next succeeding taxable year," referred to in the section as the "third year." In all cases the deduction is to be made under regulations made by the Commissioner.

It is plain that under this section the Haines Company, had it not taken advantage of the statutory provision authorizing consolidated returns, would have been permitted to carry over its net loss of 1925 for the next two succeeding years, and as it made no profit in 1926 its entire net loss for 1925 could have been deducted from its profit in 1927. But the government contends that the taxpayer has forfeited that privilege by making a return for the first five months of 1925, as it was required to do in order to avail itself of the privilege of making consolidated returns after the date of affiliation. It is said that the two periods in 1925, for which separate returns were made, are two separate taxable years within the meaning of the tax act, so that the "third year" within which § 206 permits the deduction is, in this case, the year 1926. This construction is required, it is urged, by the definition of "taxable year" in § 200 (a), which reads:

"(a) The term 'taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The

term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. The term 'taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925." (U. S. C., Title 26, Sec. 931.)

The provision that the term "taxable year" "includes" the period of less than twelve months for which a separate return is made, when read only with its immediate context, is not free from ambiguity. It may be admitted that the term "includes" may sometimes be taken as synonymous with "means", and that the subsection may be taken to require, as the Government contends, that a fractional part of a normal taxable year of twelve months for which a return is made shall be treated, for all purposes, as a separate taxable year.

But the phraseology is also open to the construction that the word "includes" is used as the equivalent of "comprehends" or "embraces," and that by it the section merely adopts a familiar device in aid of statutory construction, by providing that wherever other sections refer to a "taxable year" that phrase may, if the context requires, be taken also to refer to or to "include" a fractional part of that taxable year, for which a separate return is made.[1]

[1]The terms "means" and "includes" are not necessarily synonymous. The distinction in their use is aptly pointed by §§ 2, 200 of the Act itself. § 2 (a) gives general definitions of ten terms; of these, three are stated to "include" designated particular instances, the other seven are stated to "mean" the definitions subsequently given. § 200, in addition to the definitions contained in subsection (a), gives four of which two use the verb "include" and two the verb "means". That the draftsman used these words in a different sense seems clear. The natural distinction would be that where "means" is employed, the term and its definition are to be interchangeable equivalents, and that the verb "includes" imports a general class, some of whose particular instances are those specified in the definition. This view finds support in § 2 (b), which reads: "The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined." This indicates that the particular is not necessarily a substitute for the general term, excluding more general meanings included within its scope. "Taxable year" is defined in § 200(a) as "meaning" a calendar or fiscal year of twelve months, and "in-

If the language is so construed and applied here, "the loss sustained for any taxable year," which § 206 permits to be carried forward, would include the loss sustained for the first five months of the taxable year for which the separate return was made, and that loss, as well as any other loss separately reported for the remaining part of the taxable year, not otherwise absorbed, could be carried forward to the taxpayer's next two succeeding taxable years, here the calendar years of 1926 and 1927. This construction finds support in the final sentence of the subsection which declares that the "first taxable year", which by definition "includes" a fractional part of the year, "shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925." Obviously the first five months of 1925 could not be the calendar year 1925. But a return made for those months, a fractional part of the year, might be treated, within the meaning of the section, as a return for the calendar year of which they are a part. It plainly is not contemplated that the five months are to be treated as a taxable year different from the calendar year.

But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part. See *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 464. The revenue acts since the Sixteenth Amendment have consistently assessed income taxes on the basis of annual accounting periods, either the calendar year or the different fiscal year which the taxpayer may adopt. From the beginning these periods have been known as taxable years and the provisions of the taxing statutes have been drafted and enacted with primary reference to such normal accounting periods. *Burnett* v. *Sanford & Brookes Co.*, 282 U. S. 359, 363; *Woolford Realty Co., Inc.* v. *Rose*, 286 U. S. 319, 326. The statutes since 1917, and related regulations, have uniformly required the taxpayers' returns to be made on the basis of the twelve months' accounting period shown by the taxpayer's books, whether it be the calendar

cluding" a fractional part of a year; it hardly can be said that the words plainly and without ambiguity import that in § 206 (b) the term must be taken to mean only a fractional part of the year, to the exclusion of the alternative definitions of a calendar or fiscal year.

year or a different fiscal year. The change of this period by the taxpayer from the calendar to a different fiscal year or the reverse, has been permitted only on consent of the Commissioner and upon compliance with appropriate regulations. These dominating features of income tax legislation were incorporated in the 1926 Act by §§ 212, 232, to which § 200 (a) expressly refers.

The definition of "taxable year" in § 200 (a) is therefore incomplete unless it be understood that the period for which a return is made, whether it be for a year or a fractional part of it, is to be related to the twelve months' accounting period of the taxpayer. Where the return is for a period of less than twelve months, the year of which it is a fractional part is the annual accounting period of the taxpayer, which is his taxable year. Here the taxpayers' taxable year, both before and after the year of affiliation, was the calendar year. After affiliation, as before, the affiliated corporations, although filing consolidated returns, continued to be separate taxable units. The consolidated returns operated only to unite them for the purpose of tax computation and the equitable apportionment between them of the tax thus computed. See *Woolford Realty Co., Inc.* v. *Rose, supra,* 328. During 1925, the year of affiliation, the accounting year of the taxpayers remained the calendar year and was their taxable year in the sense that it was the twelve months' accounting period for which they were bound to report income and pay taxes, although permitted to make separate returns for fractional parts of the year in order that the income for the seven months following affiliation might be reported in a consolidated return. The filing of separate returns for fractional parts of the year did not involve any change of the taxpayer's accounting year, and had no effect upon the actual net income of the taxpayer for that year, or on the amount of tax payable except insofar as the provisions for a consolidated return were availed of.

Section 206 (b) appeared in the revenue acts prior to the addition, in § 200 (b), of the provision that the term taxable year includes fractions of a year. See §§ 204 (b) of the Revenue Acts of 1918, c. 18, 40 Stat. 1057, 1061, and 1921, c. 136, 42 Stat. 227, 231. In the 1921 Act it allowed to the taxpayer entitled to its benefits two full accounting periods of twelve months each within which he might carry over and deduct losses of an earlier taxable period.

In view of the extent to which the practice of fixing the tax with reference to the twelve months' accounting periods of the taxpayer has been recognized and carried into the structure of the revenue acts, only clear and compelling language added to § 200 (a) to define the phrase "taxable year" would justify application of that phrase in the remedial section 206 to periods of less than twelve months, in such manner as to restrict the benefits which like sections had previously extended to taxpayers entitled to enjoy them.

It is no answer to the arguments of respondent to say, as the Government does, that the meaning of the phrase "taxable year" must be the same throughout the section. The same meaning need not always be attributed to a phrase which, by hypothesis, has more than one meaning for purposes of statutory construction. By the Government's own construction, taxable year as used in § 206 is taken to mean the first five months of 1925, the last seven months of that year, and the entire calendar year 1926. The question which we have to decide is whether the two taxable years, within which the taxpayer is permitted to deduct his loss are to be taken as the two taxable years of the taxpayer, here the calendar years 1926 and 1927, even though the statute includes in the loss to be deducted that incurred in the first five months of the calendar year 1925.

The provision of § 200 (a), that the term taxable year includes fractions of a year for which a return is required, first appeared in the like section 200 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 254. The corresponding sections 200 of the 1918 and the 1921 Acts made no reference to fractions of a year for which a return is made. They defined the taxable year as the twelve months of the calendar year or of the fiscal year on the basis of which the net income was computed, although §§ 226, 240 of each act and related regulations provided in special circumstances for returns for a fractional part of a year. Before the 1924 Act the Commissioner had ruled that a fractional part of a taxable year for which a tax return was made was not a taxable year, and that in consequence the privilege granted to taxpayers by § 204 (b) of those acts of carrying over a loss sustained "for any taxable year" to the next or the two succeeding taxable years did not extend to losses shown by a return for a fraction of a year. This ruling was sustained by numerous decisions of the Board

of Tax Appeals. See *Takoma Grocery Company* v. *Commissioner,* 1 B. T. A. 1062; *Arthur Walker & Co.* v. *Commissioner,* 4 B. T. A. 151; *Dorsey Drug Co.* v. *Commissioner,* 7 B. T. A. 229; *Turners Falls Power & Electric Co.* v. *Commissioner,* 9 B. T. A. 435; *General Box Corp.* v. *Commissioner,* 22 B. T. A. 725, 729. The House Ways and Means Committee, in reporting the bill which became the Revenue Act of 1924 explained the amendment to § 200 as follows: "In subdivision (a) of this section the term 'taxable year' is defined to include a period of less than a year when a return is made for such period. Under the existing law the use of the term 'taxable year' in the 'net loss' section and other sections has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the result that the benefits of such section are denied to taxpayers who are required by law to make a return for a fractional part of a year." Report 179, Ways and Means Committee, 68th Cong., 1st Sess., p. 10. The report of the Senate Finance Committee uses identical language. Report 398, Finance Committee, 68th Cong., 1st Sess., p. 10.

The 1918 Act had permitted the carrying over of the loss for a single taxable year. The 1921 Act had extended the privilege for a period of two full years. There is no suggestion in the committee reports that by the 1924 amendment of § 200, in order to extend the benefits, conferred by § 204 in earlier acts, to the taxpayer who makes a return for a fractional part of his taxable year, there was the purpose to withhold from him any of these benefits. The implication is clear that there was not, and that the intention was that a taxpayer filing a return for a part of his taxable year should stand on the same footing, with respect to carrying over a loss shown by his return, as the taxpayer who had filed a return for the entire twelve months of the same taxable year. This intention was made effective by the addition to § 200 of words which, in terms, made the phrase "taxable year" as used in § 206 include "in the case of a return for a fractional part of a year," that part of the taxable year for which the return is made. Thus, under § 206 the loss for a taxable year which may be carried over includes the loss for the fractional part of the taxable year of the taxpayer, for which a separate return is required. The next succeeding taxable years to which the loss may be carried are likewise the taxable years of the taxpayer, here the calendar years 1926 and 1927.

It is of some significance that Article 634 of Treasury Regulations 69, which in case a consolidated return is made requires a separate return for the fractional part of a year not included in the consolidated return, uses the phrase "taxable year" as referring to the taxable year of the taxpayer, and speaks of the fraction of a year for which a separate return is made as "the portion of the taxable year" during which the taxpayers were not affiliated. It does not refer to the return as the return for a taxable year, but only as a return for a fractional part of the taxable year and such returns are required to be made and the tax is required to be paid at the same time as in the case of a return for the entire taxable year.

It is unnecessary to consider the effect to be given to returns required for a fractional part of the year, where the taxpayer changes his taxable year from a calendar year to a different fiscal year, or vice versa, with respect to which different considerations may enter. See *Wishnich-Tumpeer, Inc.* v. *Commissioner, supra.*

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.